

R E P O R T S
O F
C A S E S A D J U D G E D
I N T H E

Court of King's Bench,

B E G I N N I N G

Michaelmas Term, 25 Geo. 2.

E N D I N G

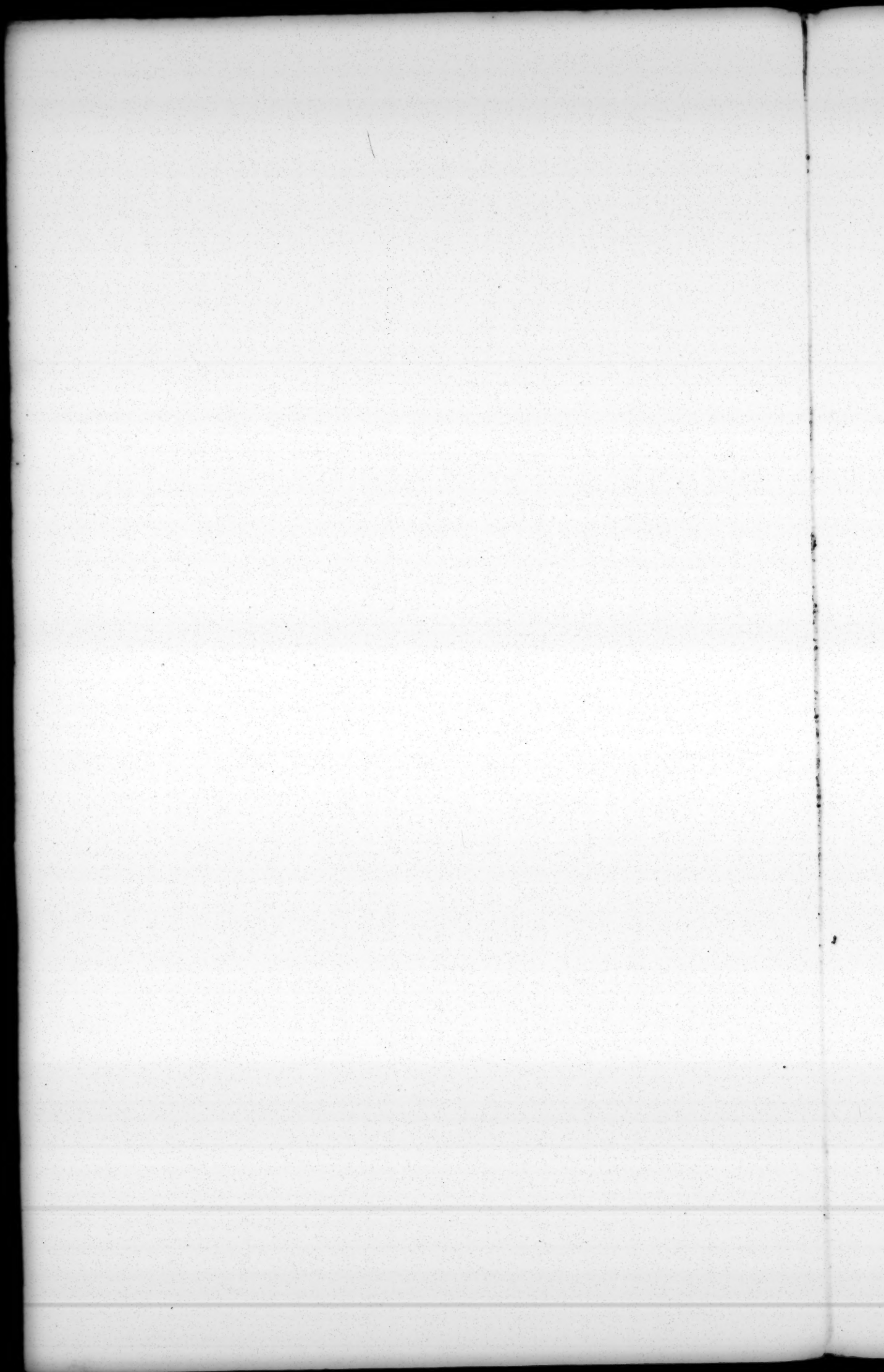
Trinity Term, 29 & 30 Geo. 2.

By JOSEPH SAYER, Serjeant at Law.

D U B L I N :

Printed for J. MILLIKEN, No. 32, GRAFTON-STREET.

1790.



P R E F A C E.

IT is not very easy to determine, which is the most useful method of Reporting a Law Case.

Upon the best Consideration, the Reporter was able to give the Matter, the following Method appeared to be the most useful, and has been observed, in reporting the Cases contained in this Volume.

In the first Place, to shew in what manner the Case came before the Court ; in the next, to state the Facts of the Case, and if a Question did arise upon any part of the Pleadings, to state such Part ; then, to mention the Question or Questions

P R E E A C E.

Questions which arose in the Case ; and to conclude with the Judgment of the Court.

As the material Things, which were said, and the Cases, which were relied upon, in arguing a Case, are taken Notice of by the Court, in giving Judgment, the Arguments of Council, for the sake of avoiding Repetition, are omitted.

Upon the whole, the Endeavour has been, to Report the Cases in the Manner, which seemed most proper to convey the necessary Information, and to do this, with as much Brevity as was consistent with Perspicuity.

Michaelmas

Michaelmas Term,

25 Geo. 2. 1751.

Sir William Lee, *Chief Justice.*

Sir Martin Wright,
Sir Thomas Denison, } *Justices.*
Sir Michael Foster,

Golding *vers.* Crowle.

UPON a rule to shew cause, why a new trial should not be had, in an action upon the case, it appeared; that the action was for maliciously prosecuting an indictment for perjury; that it was proved on the part of the plaintiff, that upon the trial of the indictment he had been acquitted upon the merits; that it was proved on the part of the defendant, that there was probable cause for preferring the indictment; that *Denison* J. before whom the action was tried, had directed the jury, that upon this evidence they ought to find a verdict for the defendant; and that the verdict was for the plaintiff.

If a bill of indictment have been found a true bill, express malice must be proved in an action for maliciously prosecuting the indictment.

The rule was made absolute.

B

And

And by the court—As the direction of the judge was in a matter of law, and was, in our opinion, very right, the present verdict, which is contrary thereto, ought not to stand. More was proved in this case on the part of the defendant, than it was incumbent upon him to prove; for in the case of *Savil v. Roberts*, *Salk.* 15. it is laid down, that if a bill of indictment have been found a true bill, the defendant, in an action for maliciously prosecuting the indictment, shall not be obliged to prove a probable cause for preferring the bill: But it shall lie upon the plaintiff to prove express malice.

Rex vers. The inhabitants of West-Shefford.

A settlement cannot be gained, by residing less than forty days upon an estate for years, which a man becomes intitled to by act of law.

IN an order of sessions it was stated; that *John Bird*, late husband to the *pauper*, went to reside under a certificate in the parish of *West-Shefford*; that during his residence there under the certificate, *John Bird* his father died, to whom and his assigns an estate, of the value of fourteen pounds a year, had been granted for ninety-nine years, determinable upon the death of *John Bird* the father, and *John Bird*, late husband to the *Pauper*; and that after the death of *John Bird* the father, *John Bird*, the *Pauper's* husband, entered upon the estate, and resided upon it to the time of his death, which happened twenty-eight days after his entering thereupon.

The question was, Whether *John Bird*, late husband to the *Pauper*, gained a settlement in the parish of *West-Shefford*?

It was holden that he did not.

And

And by *Lee Ch. J.*—It has been considered as a settled point, ever since the case of *Rex v. the inhabitants of Grandborough, Trin. 4 G. 1.* that if a person become intitled by act of law to an estate for years, and go to reside thereupon, he cannot be removed from it.

It is likewise a settled point, that if a person reside forty days upon an estate from which he is irremovable, he gains a settlement: But as it has never been holden, that a settlement can be gained by residing less than forty days upon such an estate, and as in the present case there was a residence of only twenty-eight days, the *pauper* did not gain a settlement.

Wood vers. Lake.

IN a case reserved, in an action upon the case, it was stated; that the defendant had agreed, by a parol agreement, that the plaintiff should have the liberty of stacking coals upon part of a close belonging to the defendant, for the term of seven years, and that, during this term, he should have the sole use of that part of the close, upon which he was to have the liberty of stacking coals; and that, after the plaintiff had, pursuant to this agreement, enjoyed the liberty of stacking coals three years, the defendant locked up the gate of the close.

A parol agreement for the liberty to stack coals upon the land is good for seven years.

The question was, Whether this agreement was good for seven years?

Lee Ch. J. and *Denison J.* were of opinion, that it was.

And by them—In the case of *Webb v. Paternoster, Palm. 71.* it is laid down, that the grant of a licence to stack hay upon land does

not amount to a lease of the land; and, although it be in that case said, that such a licence, provided the grant be for a time certain, is irrevocable, it by no means follows, that an interest in the land does thereby pass. As the agreement in the present case was only for an easement, and not for an interest in the land, it did not amount to a lease, and consequently it was, notwithstanding the statute of frauds and perjuries, good for seven years.

Wright J. was absent.

Foster J. concurred in opinion, that the agreement did not amount to a lease: But he inclined to be of opinion, that the words in the statute of frauds and perjuries, *any uncertain interest in land*, do extend to this agreement, and consequently that it was not good for more than three years.

Lee Ch. J. and *Denison J.* inclined to be of opinion, that the words in that Statute, *any uncertain interest in land*, do relate only to interests, which are uncertain as to the time of their duration.

After taking time to consider it was holden that the agreement was good for seven years.

Tyler *vers.* Browning.

Charcoal is not Firewood within the meaning of a Statute, exempting firewood from the payment of toll at at turnpike.

IN a case reserved, in an action upon the case, it was stated; that horses laden with firewood are, by the Statute under which a certain turnpike was erected, exempted from the payment of toll; and that the defendant, who was collector of toll at the turnpike, had insisted upon, and taken toll for a horse laden with charcoal.

The

The question submitted to the court was, Whether charcoal be firewood within the meaning of the statute?

It was holden that it is not.

In arguing this case, the council for the plaintiff attempted to argue, that, although the court should be of opinion, that charcoal is not firewood, the plaintiff ought not to recover: For that charcoal is certainly coal, and that, by this act, horses laden with coal are only liable to half as much toll as other horses; whereas the defendant has insisted upon, and taken the whole toll for the plaintiff's horses. But the court refused to permit this to be argued? And *Lee Ch. J.* said, As the question, Whether charcoal be coal? is not submitted to the court by the case, we cannot take it into our consideration.

Todd vers. Dodd.

UPON a rule to shew cause, why leave should not be given to enter judgment upon an old warrant of attorney to confess a judgment, it appeared; that the warrant of attorney was entered into by two persons; and that one of them was dead.

The Question was, Whether Judgment ought to be entered against the survivor.

If one of two persons, who have entered into a warrant of attorney to confess a judgment, die, judgment may be entered against the survivor.

After taking time to consider, it was holden that it ought, and the rule was made absolute.

And by *Lee C. J.*—In the case of *Still v. Still*, 1 *Barn. 35 Mich. 11 G2.* the court of common pleas

pleas gave leave to enter judgment in a case like the present : But as that court did in the case of *Laycock v. Garforth*, 2 Barn. 38. *East*. 21 G. 2. which was also like the present case, refuse to give such leave, the case of *Still v. Still* is not now to be considered as an authority.

We do however think it reasonable, that leave should be given in the present case, to enter judgment against the survivor. It appears from divers cases, which have been cited, that if the power given to an attorney can be executed virtually, it may be executed, although it cannot be executed strictly ; and in 1 *Show*. 91. it is said to have been ruled upon motion ; that if a woman, after having entered into a warrant of attorney to confess a judgment, marry, judgment may be entered against both her and her husband.

Rex vers. Lediard.

A Certiorari does not lie, for removing a warrant of a justice of the peace.

IN obedience to a *certiorari*, for returning a conviction concerning the forfeiture of a horse, the defendant returned ; that information being made to him upon oath by J. S. and J. N. that they had seized a horse, because he was drawing in a carriage, wherein there were more than five horses, and had delivered him, pursuant to the direction of the statute, to a constable ; and that upon this information, he had issued a warrant, by which the constable was commanded to re-deliver the horse to J. S. and J. N.

Upon this return, it was holden that the *Certiorari* should be quashed.

And by *Lee Ch. J.*—There is in this case no conviction. It is essential to a conviction, that it be founded upon a proceeding against a person ;

a person ; but in the present case, the proceeding was against a thing. It is likewise essential to a conviction, that it be a judicial act ; but the issuing of the warrant in the present case was a ministerial act, which the defendant was required by the statute giving the forfeiture to do. A *Certiorari* does not lie for removing a warrant of a justice of the peace ; the remedy for the party thereby injured being by an action.

Kirk *vers.* Broad.

A Rule having been obtained, for changing the venue in an action upon the case, wherein the plaintiff had declared upon a promissory note, the question, upon a rule to shew cause why that rule should not be set aside, was, Whether the venue could in such action be changed? The venue may be changed in the king's bench in an action upon a promissory note.

It was holden that it might.

And by *Lee Ch. J.*—It is the settled practice (A) of this court, that the venue may be changed in any action, the right of which is founded upon simple contract. If an action be brought in this court upon a policy of insurance, the venue may be changed, unless the policy be a deed.

Weaver *vers.* Chandler.

UPON a rule to shew cause, why an *Exoneretur* should not be entered upon the bail piece, it appeared that the bail had ren- Leave given to enter an *Exoneretur* on the bail piece.

(A) The practice of the court of common pleas is different as to this matter from that of the court of king's bench. If the right of an action in that court be either in the whole or in part founded upon a promissory note, the venue, as appears from 1 *Barn.* 341, 345, 349. 2 *Barn.* 390. 392. cannot be changed.

dered

dered the defendant regularly, and had given notice of the render to the plaintiff's attorney; that the defendant had been since in custody; and that the defendant's attorney had omitted to enter an *Exoneretur* upon the bail piece.

The rule was made absolute, upon paying the costs which had accrued since the render.

Rex vers. The Inhabitants of Ilam.

A settlement cannot be gained by a service which commences before the Hiring.

IN an order of sessions it was stated; that the *Pauper* had served J. S. in the parish of *Ilam* eight weeks upon liking; that at the end of the eight weeks J. S. hired him for a year, to commence from the beginning of the eight weeks; and that, including the eight weeks, he served a year and ten days.

The question was, Whether the *Pauper* gained a settlement in the parish of *Ilam*?

It was holden that he did not.

And by the court—There must, in order to gain a settlement, be a hiring for a year, either absolute or conditional, previous to the commencement of the service, which there was not in the present case. The cases have already gone far enough, if not too far, as to the gaining of a settlement by hiring and service: But no one has gone so far as to hold, that the hiring may have a retrospect to a service anterior thereto.

Carey *vers.* Humot.

UPON a rule to shew cause, why the judgment should not be set aside for irregularity, it appeared; that the judgment was signed for non-payment for the issue; and that it was signed within twenty-four hours after the delivery of the issue.

A judgment signed for non-payment for the issue set aside, because signed in less than twenty-four hours.

The rule was made absolute.

And by the court—a reasonable time after the delivery of the issue ought to be allowed for payment; and we are of opinion, that less than twenty-four hours is not a reasonable time.

Rex *vers.* The Inhabitants of Marden.

IT was stated in an order of sessions; that the *Pauper* and J. S. jointly hired a tenement in the parish of *Marden*, at the rent of sixteen pounds a year; that they occupied it jointly; that each of them paid a moiety of the rent; and that the tenement had then-fore been let for twenty pounds a year.

A settlement cannot be gained by hiring the moiety of a tenement of the annual value of sixteen pounds.

The question was, Whether the *Pauper* gained a settlement in the parish of *Marden*?

It was holden that he did not.

And by the court—As the tenement is not stated, to be at present of the value of twenty pounds a year, we cannot take it to be so.

C

It

It has been said, that as each of the tenants was liable to the whole rent, the *Pauper* ought to gain a settlement: But it is certain, that neither of them had an interest in more than a moiety of the tenement, which is only eight pounds a year.

It has likewise been said, that, as no power of removal is given by the 13 & 14 *Ch. 2. c. 12.* as to any person or *persons* coming to settle in a tenement of the value of ten pounds a year, the *Pauper*, being one of two persons who jointly hired a tenement of the yearly value of sixteen pounds, did thereby become irremoveable, and consequently he gained a settlement: But although the word *persons* be in the Statute, it never could be the intention of the Legislature, that two persons should gain a settlement, by hiring a tenement of the yearly value of ten pounds.

Hilary

Hilary Term

25 Geo. 2. 1752.

Sir William Lee, *Chief Justice.*

Sir Martin Wright,
Sir Thomas Denison, } *Justices.*
Sir Michael Foster,

Rex vers. The Inhabitants of Buckingham.

IN an order of sessions it was stated ; that the *Pauper*, together with his family, of which the *Pauper* was a part, came to reside in the parish of *Buckingham*, under a certificate given to the father ; that, during the residence of the *Pauper* with his father under the certificate, he was hired for a year as a servant in the parish of *Buckingham* ; and that he served the year in that parish.

The question was, Whether the *Pauper* gained a settlement in the parish of *Buckingham* ?

A son, who comes with his father to reside in a parish under a certificate given to the father, cannot gain a settlement by a hiring in that parish during such residence and a service under the hiring.

It was holden that he did not.

And by the court—The *Pauper* came to reside in the parish of *Buckingham* under a certificate; and it is by the 9 & 10 W. 3. c. 11. enacted, “That no person whatsoever, who
 “shall come into any parish by a certificate,
 “shall be adjudged, by any act whatsoever,
 „to have procured a legal settlement in such
 “parish, unless he shall really and *bona fide*
 “take a lease of a tenement of the value of
 “ten pounds, or shall execute some annual
 “office in such parish, being legally placed
 “in such office.”

Wright *vers.* Macevoy.

A writ of *Fieri Facias* may be amended by adding a *Teste* thereto.

UPON a rule to shew cause, why a writ of *Fieri Facias* should not be set aside, the question was, If the writ could be amended by adding a *Teste* thereto?

It was holden that it might.

And by *Lee Ch. J.*—According to what is laid down in divers old cases, which have been cited, a writ is not amendable by adding a *Teste* thereto: But courts have of late years gone much further in ordering amendments than they did heretofore.

It has been said, that there is in the present case nothing to amend by: But an award of a writ of *Fieri Facias*, with a *Teste*, may be entered upon the roll, and when this done, the writ may be amended by the Roll.

Lewis

Lewis *vers.* Wallis.

IN an action upon the case, for the use and occupation of land, by the permission of the plaintiff, the defendant pleaded *nil habuit in tenementis*.

Upon a demurrer to this plea, it was holden to be bad.

And by *Lee Ch. J.*—Actions for the use and occupation, which were heretofore much discouraged, have of late years been encouraged, and a recovery in them is, in certain cases, made more easy by a modern statute.

In the case of *Richards v. Holditch*, *Hil. 13 G. 2.* it was holden, upon great consideration, that *nil habuit in tenementis* is not a good plea, in an action for the use and occupation of a house by the permission of the plaintiff: And it would be very unreasonable, that the defendant in such action should be allowed to deny the title of the plaintiff, by whose permission he entered upon, and occupied the premises.

In order to distinguish the present case from the case of *Richards v. Holditch*, it has been said; that it is not in this case expressly alledged, that the land was the land of the plaintiff; whereas in the case of *Richards v. Holditch*, it was expressly alledged, that the house was the house of the plaintiff: And upon the ground of this distinction it has been argued; that for want of its being expressly alledged, that the land was the land of the plaintiff, there is not a good consideration set out by the plaintiff, and consequently that the

Nil habuit in Tenementis cannot be pleaded in an action for the use and occupation by the permission of the plaintiff.

the promise of the defendant to pay for the use and occupation is *nudum Pactum*. But we are of opinion, that the allegations, which are, that the defendant used and occupied the land at his own request, and by the permission of the plaintiff; and that he promised to pay for the use and occupation, do so strongly imply, that the land was the land of the plaintiff, that if the court should intend it was not, it would be a very foreign intendment.

Rex *vers.* Spencer.

The clerk in court is bound to perfect and bring in the *Postea* after an acquittal upon an indictment.

UPON a rule for the defendant's clerk to shew cause, why he should not perfect the *Postea*, by entering an acquittal, and bring it into court, it appeared; that upon removing the indictment from a court of quarter sessions, a recognizance had been entered into by the defendant's bail, the terms of which were, that the defendant should cause the indictment to be tried at a time and place therein mentioned, at his own expence; that the indictment was tried at the time and place mentioned in the recognizance; that the defendant was acquitted; and that he had not paid the bill due to his clerk in court for fees.

The question was, Whether the clerk in court ought to perfect the *Postea*, by entering an acquittal, and bring it into court, before his bill for fees was paid?

It was holden that he ought.

The *Postea* being afterwards perfected and brought into court, a motion was made, that the recognizance might be discharged.

In

In opposition to this motion it was said ; that it has been the constant practice of the crown-office, not to discharge a recognizance in a case like the present, before the verdict and judgment were entered upon record ; and that if this practice is not adhered to, the stamp duty will be lessened ; the officers of the court will be injured ; and the records of the court will frequently be incomplete.

The recognizance was ordered to be discharged.

And by *Wright J.* (*Lee Ch. J.* being absent) —As the terms of the recognizance have been complied with, it is highly reasonable that it should be discharged.

Wingfield vers. Stratford and Osman.

IN an action of *Trover*, the plaintiff declared for the conversion of a gun and dog.

The defendants pleaded, that the plaintiff, not being a person qualified so to do, kept the gun and dog, the gun being an engine for the killing of the game, and the dog being a setting-dog ; and that they, as servants, and by the command of *Sir Francis Dashwood*, Lord of the Manor wherein the dog and gun were kept, took the same from the plaintiff, as it was lawful for them to do.

Upon a demurrer to this plea, it was holden to be bad ; because it amounted to the general issue.

And by *Denison J.*—It is a settled rule in pleading, that no matter which amounts to the general issue can be pleaded specially ; and the

The keeping of a gun is not a keeping of an engine for killing or destroying the game.

the reason is, that every such matter may be given in evidence upon the general issue. A release may be pleaded in an action of *Trover*; because the conversion is thereby admitted: But I do not apprehend, that any matter, except a release, can be pleaded specially in such action; because no other matter can, as I conceive, be pleaded, which would not amount to a denial of the conversion, and consequently it would amount to the general issue.

It was likewise holden, that, if this plea had not been bad, by reason of its amounting to the general issue, it would have been bad; because it is not alledged, that the gun had been used for killing the game.

And by *Lee Ch. J.*—It is not to be imagined, that it was the intention of the legislature, in making the 5 *ann. c. 14.* to disarm all the people of *England*. As greyhounds, setting dogs, hayes, lurchers and tunnels are expressly mentioned in that statute, it is never necessary to alledge, that any of these have been used for killing or destroying the game; and the rather, as they can scarcely be kept for any other purpose than to kill or destroy the game: But as guns are not expressly mentioned in that statute, and as a gun may be kept for the defence of a man's house, and for divers other lawful purposes, it was necessary to alledge, in order to its being comprehended within the meaning of the words *any other engines to kill the game*, that the gun had been used for killing the game.

In the case of (B) *Rex v. Gardiner, Trin. 11 & 12 G. 2.* it was holden, upon great consideration,

(B) A report of this case has been since published in *Strange* 1098, and it may be inferred from the report of the case by Sir *John Strange*, that this point had never been before

sideration, that there is a difference betwixt a gun and the other things expressly mentioned in the 5 *Ann. c. 14.* which can only be kept for bad purposes, and a conviction for keeping a gun contrary to that statute, was quashed; because it did not appear, that the gun had been used for killing the game.

Murray vers. Wilson.

IN the declaration, in an action for the costs of an action in an inferior court, wherein there was judgment of *Nonprofs*, it was alleged, that the inferior court had been holden from time beyond memory; and that at a court holden before a certain person, and at a certain place, judgment of *Nonprofs* was given in an action upon a promissory note.

Upon a demurrer to this declaration, it was objected; that the right of holding the court before the person, and at the place mentioned in the declaration, is not shewn; and that it does not appear, that the cause of action arose within the jurisdiction of the court.

The declaration was holden to be good.

And by *Lee Ch. J.*—It is laid down, in divers cases which have been cited; that if the plaintiff in an action in an inferior court plead a judgment in that action, he must shew the right of holding the court, and that the cause of action arose within its jurisdiction: But it is in no case laid down; that it is incumbent upon the defendant in an action in an inferior court, who pleads a judgment in that action,

D

to

The defendant in an action in an inferior court may avail himself of the judgment of that court, without shewing that the court was rightly holden, or had jurisdiction.

fore determined; it being therein said, that there was a question upon the point in the case of *King v. King, Pasch. 3 G. 1.* but that it was not determined.

to shew either of these things. It is very unreasonable, that the plaintiff in an action in an inferior court should avail himself of a judgment in that action, unless the court was rightly holden, and had jurisdiction: But it is highly reasonable, that the defendant in an action in an inferior court should avail himself of a judgment in that action, although the court was not rightly holden, or had not jurisdiction; for, as it was the fault of the plaintiff to bring his action in an improper court, the defendant ought not to be thereby prejudiced.

Clemens vers. Reynolds, Administrator.

In what manner *tout temps priſt* must be pleaded by an administrator.

IN an action upon the case, the plaintiff declared upon a promise of the defendant's intestate.

The defendant pleaded a tender; and that he has been at all times since the death of his intestate ready to pay.

Upon a demurrer to this plea, it was shewn for cause; that it is not alledged, that the defendant's intestate was at all times, from the time of making the promise to the time of his death, ready to pay.

The plea was holden to be bad.

And by the court—Whenever *tout temps priſt* is pleaded by an administrator, he must alledge; that his intestate was at all times, from the time of making promise to the time of his death, ready to pay; and that he has at all times, since the death of his intestate, been ready to pay.

Cunningham

Cunningham *vers.* Johnson.

THE defendant pleaded his privilege in abatement, which was, that he is clerk of the errors in the court of Common Pleas, and as such daily attendant upon that court.

The particular facts alleged in a plea of privilege must be verified by affidavit.

A rule for setting this plea aside was made absolute; because the truth thereof was not verified by affidavit.

And by the court—It was necessary for the defendant to swear; that the facts alledged, namely, that he is clerk of the errors in the court of Common Pleas, and that he is daily attendant upon that court, are true.

In the case of *Onslow v. Booth*, *Trin.* 12 G. 1. in this court, a plea of privilege was set aside, although it was sworn generally that the plea was true; because it was not sworn, that the particular facts therein alledged were true.

Rex *vers.* Goodman.

UPON a rule to shew cause, why a small fine should not be set upon the defendant, who had been convicted upon an indictment for a nuisance, it appeared; that the indictment, which was found at a court of conservancy, for an encroachment of about five yards in length upon the river *Thames*, had been removed by the defendant into this court; and that the nuisance was now abated.

The court refused to set a small fine upon a defendant convicted of a public nuisance, unless he would consent to go before the master.

The rule was discharged.

D 2

And

And by the court—As the defendant will not consent to go before the master, it is not proper to set a small fine. It has been said ; that as no recognizance for the payment of costs was entered into upon the removal of this indictment, such a recognizance being only required upon the removal of an indictment from a court of quarter sessions, the prosecutor is not entitled to costs : But this circumstance, that the prosecutor is not entitled to costs, because no recognizance has been entered into for the payment of costs ; renders it quite improper, for the court to discharge the defendant on the payment of a small fine. It is on the contrary highly proper ; that the court should, as was done in the case of *Rex v. Dyke*, *Trin. 21 G. 2.* set such a fine, that the third part thereof may be sufficient, to reimburse the prosecutor a considerable part of his costs : For, unless a prosecutor is, in a case like the present, to have a considerable part of his costs, it will be a great discouragement to prosecutions for public nuisances.

In the case of *Rex v. Haddock*, *Hil. 12 G. 2.* which was a conviction upon an indictment for a publick nuisance, the court, notwithstanding the nuisance was abated, refused to set a small fine, unless the defendant would consent to go before the master ; and upon this refusal, the defendant did consent to go before the master.

Rex *vers.* The Inhabitants of Locherly.

IN an order of sessions it was stated; that the *Pauper* hired of J. S. a cottage, in the parish of *Locherly*, of the yearly value of twenty-five shillings; the wick of a dairy of sixteen cows, which were to be fed upon certain land of J. S. at the rate of three pounds five shillings each cow; and the liberty of feeding a horse and some pigs on the land whereon the cows were to be fed; and that the *Pauper* was moreover to have all the short straw which arose in thrashing wheat, and five loads of hay, if so much should be wanted to feed the cattle with.

A settlement cannot be gained by hiring the wick of a dairy, together with the feed of land.

The question was, Whether the *Pauper* gained a settlement in the parish of *Locherly*?

It was holden that he did not.

And by *Wright J.* (Lee Ch. J. being absent) —Although the word tenement be a word of very extensive signification, it cannot extend to a personalty, because no personalty can, with any degree of propriety, be said to lie in tenure. The contract in the present case, as to every thing except the cottage, was for a mere personalty; for although the cows of which the *Pauper* was to have the wick, and the other cattle were to be fed upon land; yet no interest in the land, and only the mere right of feeding the cattle thereupon, did pass by the contract. It was, moreover, part of the contract; that the cattle were to be fed upon the land of J. S.

If a man were to hire a farm ready stocked, at the rate of twenty pounds a year; and the annual

annual value of the farm, exclusive of the stock, were under ten pounds, he would not gain a settlement by the hiring.

It has been truly said, that it was not expressly determined, in the case of *Rex v. The Inhabitants of Minchinghampton*, 30 G. 2. that hiring the pasture of land would not gain a settlement; the determination in that case being founded upon a want of adjudication: But the opinion of the court did, in that case, appear plainly to be; that the pasture of land is not a tenement, by the hiring of which a settlement may be gained.

Watson qui tam *vers.* Jackson, Boys and Webster.

Judgment as in the case of a *Nonfuit*, ought not to be given, unless all the defendants apply for it.

UPON a rule to shew cause, why judgment as in the case of a *Nonfuit* should not be given, it appeared; that the action was for a penalty given by one of the statutes for the preservation of the game; that the defendants had all joined in the plea of not guilty; and that *Webster* had not joined in applying for the rule.

One question was, Whether the 14 G. 2. c. 17. whereby the court is empowered to give judgment as in the case of a *Nonfuit*: "In any action between party and party," extends to this action?

It was holden that it does.

And by the court—As no part of the penalty, for which this action was brought, is given to the *King*, it is, notwithstanding a moiety of the penalty be given to the poor of the parish, wherein the offence was committed, an action between party and party.

Another

Another question was, Whether, as *Webster* had not joined in applying for the rule, judgment as in the case of a *Nonfuit* ought to be given?

It was holden that it ought not.

And by the court—As all the defendants have joined in the plea of not guilty, and one of them has not joined in the application for judgment as in the case of a *Nonfuit*, the court ought not to give such judgment.

Easter

Easter Term,

25 Geo. 2. 1752.

Sir William Lee, *Chief Justice.*

Sir Martin Wright,
Sir Thomas Denison, } *Justices.*
Sir Michael Foster,

Herbert *vers.* Williams.

The costs of a feigned issue, ordered in a criminal proceeding, ought always to follow the verdict.

UPON a rule to shew cause, why an information should not be filed against the defendant, for a misdemeanor, a feigned issue was, by consent, ordered.

The issue having been found for the defendant, and the rule to shew cause having in consequence of the verdict been discharged, the question, upon an application by the defendant for costs, was, Whether, as costs are not mentioned in the rule for the feigned issue, or in the rule for discharging the rule to shew cause, he ought to have any?

It

It was holden, that he ought to have the costs of the issue, but not any of the rule to shew cause.

And by *Wright J.* (*Lee Ch. J.* being absent) —It has been said; that although costs always follow the verdict, when a feigned issue is ordered in a civil action, none ought to be paid, when a feigned issue is ordered in a criminal proceeding; because neither party is entitled to costs in a criminal proceeding: But in the case of *Still v. Rogers*, wherein a feigned issue was ordered in a criminal proceeding, it was holden, that costs ought to follow the verdict. This case is mentioned in 1 *Lilly's Abr.* 447. as of the first year of *Queen Anne*; but, upon searching in the crown office, it is found to have been in the third year of that Queen. From a note I have of this case, it appears; that, although costs were not mentioned in the rule for the feigned issue, the determination of the Court of King's Bench was, that costs ought to follow the verdict; and it was said by *Holt Ch. J.* that where a feigned issue is sent by a court of equity to be tried in a court of law, costs do not follow the verdict; because the matter goes back for the consideration of the court of equity: But that where a feigned issue is ordered by a court of law, costs ought always to follow the verdict.

Rex vers. The Justices of the Peace of the Corporation of Rye.

UPON a motion for a rule to shew cause, why an information should not be filed against the defendants for a misdemeanor, in discharging an appeal to a Poor's rate, an affidavit was read, wherein it was sworn; that the person appealing was over-rated; that the justices were themselves under-rated;

E

and

An information is not to be granted against a justice of the peace, unless he has acted from a corrupt or partial motive.

and that although very strong evidence of both these facts was given at the quarter sessions, the justices discharged the appeal, and refused to make a special order. It was, moreover said, that if the court should not make a rule to shew cause, upon which the truth of the facts alledged in the affidavit may be put into a method of trial, there would be a failure of justice, the determination upon the appeal being final.

The court refused to make a rule to shew cause.

And by *Lcc Ch. J.*—It is the settled practice of this court, never to grant an information for any thing done by a justice of the peace in the execution of his office, unless the court be satisfied, that he acted from a corrupt or partial motive. If there should be a failure of justice in the present case, it will be owing to the act of parliament; by which an appeal to a Poor's rate in a corporation is given to the quarter sessions of the corporation. This, as the justices of the corporation are frequently interested in the matter in question; and their determination is final, may be a reason for altering law? But it is by no means proper, to make a rule to shew cause in the present case; in as much as the making of such a rule would amount to a pre-judication of this court, that the justices have acted from a corrupt or partial motive. There is, perhaps, reason to suspect the defendants of having acted from a partial motive: But it is by no means certain, that they have done so, even if the facts alledged in the affidavit are true; for the matter in question might appear in different lights to the judgments of different persons. Upon the whole, this this does not appear a case proper for an information against justices of the peace; and if it be not, it would be very improper to make a rule to shew cause, merely for the
fake

fake of bringing justices of the peace before the court, that the truth of facts alledged in the affidavit may be put into a method of trial.

Rex vers. Jopson and five others.

UPON a rule to shew cause, why the indictment should not be quashed, it appeared; that the charge in the indictment was, that the defendant, together with many other persons to the jurors unknown, did unlawfully assemble themselves to disturb the peace; and that being so assembled, the defendants with force and arms the mine of black lead of J. S. did unlawfully break and enter; and sixty pounds weight of the black lead of J. S. did unlawfully carry away.

An indictment, wherein a disturbance of the peace is charged, ought not to be quashed.

The rule was discharged.

And by *Lee Ch. J.*—It is always in the discretion of the court, whether an indictment shall be quashed, or the defendant be left to demur, or to move in arrest of judgment. The indictment in the present case, which contains a charge of a disturbance of the peace, in consequence of an unlawful assembly to disturb the peace, appears to be good; but, however, that it may be, it is by no means proper for the court to quash such an indictment.

Huish vers. Sheldon.

UPON a rule to shew cause, why a new trial should not be had in an action of *Trover*, it appeared from the report of the judge; that the verdict was for the plaintiff; that *Deard*, one of the plaintiff's witnesses, in giving his evidence had said, that a silver milk

A new trial is not to be granted, on account of a mistake by a witness in giving his evidence.

milk pot, for the conversion of which the action was brought, had been sold by him to the plaintiff.

An affidavit was read, in which it was sworn; that it appeared from a memorandum in *Deard's* book; that the milk-pot was left with him by the plaintiff, to be paid for by J. S. and that the mistake of *Deard*, in giving his evidence, was owing to the omission of a servant, who, in copying from *Deard's* book the plaintiff's account, from which account *Deard* had given his evidence, had omitted to copy the memorandum,

The rule was discharged.

And by the court—It has been said; that if the fact mentioned in the memorandum had been proved at the trial, the verdict would probably have been for the defendant: But it would be productive of the most dangerous consequences, if a verdict should be set aside; because a witness has either from inattention, or from the want of being prepared, made a mistake in giving his evidence.

Crozier *vers.* Storke.

Leave given
to plead im-
material pleas.

UPON a motion, for leave to plead three pleas, it appeared; that two of the pleas were immaterial; and it was said; that the giving leave to plead these two pleas would answer no other end, than putting the plaintiff to the expence of taking them out, and demurring to them.

A rule was made for leave to plead the three pleas.

And

And by *Lee Ch. J.*—It is not usual for the court, upon a motion for leave to plead several pleas, to go into the consideration of the materiality of the pleas, and the doing thereof would open a door for almost endless altercation. Courts were formerly a little strict, as to the giving leave to plead several pleas: But it has of late (c) years been the practice, to give leave to plead any number of pleas, provided no two of them be inconsistent with each other.

Hallet versf. Hodges.

IN a case reserved, in an action of debt upon a bond, it was stated; that the penalty of the bond was three hundred pounds; that it was given for securing the payment of one hundred and fifty pounds by instalments; namely, of fifty pounds upon the 30th day of *November 1750*, another fifty pounds upon the 30th of *March 1751*, and the other fifty pounds upon the 30th day of *November 1751*; that the condition of the bond was, that upon the payment of the said sums on the said days respectively the bond was to be void, otherwise to remain in force; that the two first days were past; and that neither of the two first sums were paid.

If a bond be to pay money by instalment, an action lies upon the first failure of payment.

The

(c) It may not be improper to observe in this place, that for two or three years past, the court of common pleas has been strict, as to giving leave to plead several pleas. It is not at this day sufficient in that court, that the pleas intended to be pleaded are all material: But the court expects to be satisfied of the necessity to plead several pleas, before a rule is made to shew cause, why they should not be pleaded.

The question was, Whether the action could be maintained?

It was holden that it might.

And by *Lee Ch. J.*—It has been said; that the bond, as appears from the condition, was only to be in force on the failure of paying all the three sums, the words, *or any of them*, not being inserted in the condition; and it is inferred, that the present action is premature; because it was brought before the last day of payment was past: But we are of opinion, that the present action is well brought, and that an action might have been brought upon the failure of paying the first sum. In the case of *Cooté v. Howell*, *Mich. 18 G. 2.* in this court, the condition of a bond to pay money by instalments, was to the same purport as the condition of the present bond is; and it was in that case holden, that an action lay upon the failure of paying the first sum.

Rex vers. Owen.

A trial at bar put off: Because the persons upon the pannel for a special jury were not summoned in proper time.

AS very few of the persons upon the pannel for a special jury, for trying an information at bar, answered to their names; and it appeared that they were not summoned, till nine in the evening of the day before the day fixed for the trial, the trial was put off.

And by *Lee Ch. J.*—If the persons upon the pannel for a special jury have not notice thereof, such a sufficient time before the trial,

as

as that they may be able to appear, the design of the party, upon whose application it was ordered, to have this cause tried by a special jury, will not probably be answered; and it is certain, that the persons upon the pannel have not, in the present case, had such notice.

Foster J. added, that, in his opinion, six days notice at the least ought to be given.

Kenrick vers. Taylor.

IN a case reserved, in an action upon the case, it was stated; that the plaintiff had alledged in his declaration, that a certain pew in a church was appurtenant to an antient messuage; that the plaintiff and other occupiers of the messuage had constantly sat in the pew; and that the defendant, who was a mere stranger, had disturbed the plaintiff in the enjoyment of the pew: But it was further stated; that no evidence was given that the plaintiff, or any other occupier of the messuage, had at any time repaired to the pew, or that the occupier of the messuage for the time being was bound to repair it.

The having repaired a pew is not necessary to be proved, in an action against a stranger, for being disturbed in the enjoyment of the pew.

The question was, Whether the action could be maintained?

It was holden, upon great consideration, that it might.

And by *Lee* Ch. J.—It has been said; that the plaintiff ought not to have alledged, that he and the other occupiers of the messuage had been used to repair the pew; for that in the case of *Dawney v. Dee, Cro. Jac. 605. Trin. 18 Jac. 1.* an usage to repair the pew is alledged,

ledged, in an action for being disturbed in the enjoyment thereof: But in the case of *Ashley v. Freckleton*, 3 Lev. 73. Mich. 34 Car. 2. which was many years subsequent to this case, it was holden, that if such action be brought against the ordinary, in whom *prima facie* the right to all the pews in a church is, an usage to repair the pew must be alledged: But that if such action be brought against a stranger, it is sufficient to alledge a possession of the pew.

It has been said; that if it were necessary for the plaintiff to alledge, that he and the other occupiers of the messuage had been used to repair the pew, it was necessary for him to prove. that he and they had been used to repair it, or at least, that the occupier of the messuage for the time being was bound to repair it; and the case of *Buxton v. Bateman*, 1 Sid. 203. Pasch. 16 Car. 2. has been cited: Wherein it was holden, that the want of alledging in such action an usage to repair the pew, would be bad upon a demurrer; and the reason given, why it is not bad after a verdict, is, that it shall after a verdict be intended that the usage was proved. But in the case already mentioned of *Ashley v. Freckleton*. which was some years subsequent to this case, it is laid down generally; that it is sufficient to alledge a possession of the pew, in an action against a stranger for being disturbed in the enjoyment thereof; because the stranger is to be considered as a wrong-doer.

Upon the whole we are of opinion, that as the present action is against a stranger, it was not necessary for the plaintiff either to alledge, or to prove, that he or any other occupier of the messuage had at any time repaired the pew, or that the occupier of the messuage for the time being was bound to repair it.

Grove and Wife *vers.* Hart.

UPON a rule to shew cause why the judgment should not be arrested in an action upon the case, it appeared; that the action was brought for slanderous words spoken of the wife; namely, that *she keeps a bawdy-house*.

A wife may join with her husband, in an action for saying she keeps a bawdy-house.

The question was, Whether the wife could join in an action for these words?

It was holden that she might.

And by *Lee Ch. J.*—As a wife, as well as her husband, is punishable for keeping a bawdy-house, a right of action for the speaking of these words would have survived to the wife; and consequently it was proper for her to join in the action.

Trinity Term,

25 & 26 Geo. 2. 1752.

Sir William Lee, *Chief Justice.*

Sir Martin Wright,
Sir Thomas Denison, } *Justices.*
Sir Michael Foster,

Rex vers. Simons.

A verdict set
aside on ac-
count of its
being contra-
ry to the di-
rections of the
judge in a
matter of law.

UPON a rule to shew cause, why a new trial should not be had in an indictment, it appeared from the report of *Foster J.* that the charge in the indictment was, that the defendant did privily and unlawfully convey into the pocket of *Ashley* the prosecutor three ducats, with a malicious and wicked intent, falsely to accuse the said *Ashley* of having robbed the defendant of the ducats; that when the jurors came into court, to give their verdict, they mentioned to the judge a difficulty they were under, namely, that they were of opinion, that the defendant did put the ducats into *Ashley's* pocket, but that they were also of opinion, that he did not do it with an intent to accuse *Ashley* of a robbery; that

that the judge thereupon directed the Jury, that they could not find the defendant guilty of the fact, without finding him guilty of the intent, and that they must either find him guilty of both, or acquit him; that a verdict was soon after given, which was taken and entered by the officer, and understood by the judge to be a general verdict of guilty; and that from the time of the coming of the jurors into court, to the time of giving the verdict, there was a great crowd and noise in court.

An affidavit was likewise read, in which it was sworn by all the jurors; that there was a mistake in taking and entering the verdict; that they had agreed to find the defendant guilty of the fact, but without any evil intention; that one of them called out aloud, at the time of giving the verdict, *no intent, no intent*; and that the crowd and noise in court were so great, that they did not hear what the learned judge said, when they mentioned the difficulty they were under.

The rule was made absolute.

And by *Lee Ch. J.*—The court does not set aside this verdict, on account of an afterthought of the jurors; for it would be a precedent of a most dangerous tendency, to set aside a verdict on that account: But as it appears from the report of the judge, as well as from the affidavit of the jurors, that they did not hear, or did not understand his direction, which was, in our opinion, a very proper one, the verdict ought not to stand; because it is contrary to the direction of the judge in a matter of law. It is very clear, from their having mentioned the difficulty they were under to the judge, before they gave their verdict, and from the calling out of one of them

at the time of giving it, *no intent, no intent*, that the jurors did not mean to find the defendant guilty of the intent; and if they did not, they ought, pursuant to the direction of the judge, to have acquitted him.

And by *Denison J.*—If the verdict had been taken as the jurors intended to give it; namely, guilty of the fact, but without any evil intention, it would have been an incomplete verdict, and consequently, no judgment could have been given upon it.

Rex vers. The Mayor and Burgeffes of Nottingham.

A *Mandamus* for restoring to an office need not shew the nature of the right to the office.

A *Mandamus* had been awarded; whereby, after reciting, that, for time whereof the memory of man is not to the contrary, there has been, and that there ought to be, in the town of *Nottingham*, a common-council, consisting of twenty-four persons, and that there are now six vacancies in the common-council, the defendants were commanded to elect six persons to fill up the vacancies.

The return to this *Mandamus* was; that there ought not to be, in the town of *Nottingham*, a common-council consisting of twenty-four persons.

Upon a rule to shew cause, why the *Mandamus* and the return thereto should not be quashed?

It was holden, that neither the *Mandamus* nor the return ought to be quashed.

And

And by *Lee Ch. J.*—As a ground for quashing this *Mandamus*, it has been said; that the nature of the right, to have a common-council consisting of twenty-four persons, is not set out with sufficient particularity: But divers precedents of *Mandamus* have been produced, in which the right, to have the thing commanded, done, is set out as generally as it is in the present *Mandamus*; and it is certain, that no precise form is necessary in a *Mandamus*.

As a ground for quashing the return to this *Mandamus*, it has been said; that no other issue can be taken thereon, than whether there ought to be a common-council, in the town of *Nottingham*, consisting of twenty-four persons, which, it being rather a question of law than of fact, is more proper for the determination of the court than of a Jury: But as the question, whether there ought to be such a common-council, must depend upon a fact; namely, whether there has been an usage in the town of *Nottingham* to have such a common-council, it is a question proper for the determination of a jury.

Rex vers. The Mayor and Aldermen of Doncaster.

TO a *mandamus*, for restoring *John Beale* to the office of alderman of the borough of *Doncaster*; the return was; that *John Beale* was not resident in the borough at the time of his election, but lived at the distance of three miles from thence, and has not since resided in the borough; that from the day of his election, which was on the 9th day of *December* 1750, to the 26th day of *December* 1751, he absented himself from the borough, and

The particular cause of being removed from an office in a corporation must be shown, in the return to a *Mandamus* for restoring to the office.

and neglected and omitted the duty and execution of his office; and thereby, during that time, deprived the mayer and common-council of the assistance and advice, which by the duty of his office, and obligation of his oath, he ought to have given; contrary to the true intention, direction and effect of the charters of the borough; to the great hinderance and delay of the public business, and of the good rule and order of the borough; and to the great damage, disappointment and prejudice of the corporation; that *John Beale*, being present in a common-council, was charged with, and accused of, the non-residence, non-attendance, neglect of duty and misbehaviour aforesaid, and asked what he had to say, why he should not be removed from his office; that upon his not denying the charge, nor offering any thing in his defence, nor desiring a further day to answer, the common-council removed him from his office, for his non-residence, non-attendance, neglect of duty and misbehaviour aforesaid; and that therefore they cannot restore him.

This return was, upon great consideration, holden to be insufficient; and a peremptory *mandamus* was awarded.

And by *Lee Ch. J.*—It does not appear from this return; that a power of removing from an office for good cause is vested in the common-council. Such a power is, indeed, incidental to every corporation: But it never can be exercised by a part of a corporation, unless it is vested in that part by charter or prescription.

If it had appeared from this return; that a power of removing from an office for good cause is vested in the common-council, the cause returned for the removal of *Beale* is
not

not a good one. As *Beale* resided so near the borough, that he might attend the duty of his office, and as it does not appear that more than one common-council, at which he did attend, was holden whilst he was in the office of alderman, there was not such a total desertion of the duty of his office, as was a good cause of removal; and it would be very strange to hold, that the residing two or three miles out of the borough, which officers of a corporation frequently do, is a good cause of removal from an office.

In the case of *Rex v. The Mayor of Newcastle*, Mich. 21 G. 2. the officer removed had been absent from the corporation twenty-two years, and resided at the distance of two hundred miles from the borough; which being considered as a total desertion of the duty of his office, it was holden to be a good cause of removing him from his office.

This return is bad for another reason; namely, that it does only charge a general neglect and omission by *Beale* of the duty of his office; whereas it ought to have shewn the particular instances of neglect and omission, that the court might have judged, whether such neglects and omissions are a good cause of removal.

In the case of *Rex v. The Mayor, Aldermen and Burgeffes of Doncaster*, Lord Raymond 1566. the return to a *mandamus* for restoring *Scot* to an office was; that *Scot* had obstinately, and voluntarily, refused to obey several orders and laws made for the good of the borough, contrary to the duty of his office. This return was holden to be insufficient; because it did not shew the particular orders or laws, which *Scot* had refused to obey.

It

It has been said; that *Beale* was incapable of being elected an alderman, on account of his non-residence in the borough at the time of his election; and that therefore he ought not to be restored: But as he was in fact elected, it is not a good return to a *mandamus* for restoring him, to say that he was incapable of being elected. The proper way of trying, whether he was capable of being elected, being in an information in the nature of a *quo warranto*.

Perkins and Another, Assignees of Hughes
vers. Smith.

A servant is answerable for a tortious act done for the benefit of his master, although it be done by the command of his master.

IN a special verdict, in an action of *trover*, it was stated; that the defendant was a riding clerk to *Garraway*, a tradesman; that he went to the house of *Hughes*, in order to receive some money due from *Hughes* to *Garraway*; that *Hughes*, before the defendant went to his house, had absconded; that his shop was at that time shut up, and that he was afterwards declared a bankrupt; that after *Hughes* had committed an act of bankruptcy, but before he was declared a bankrupt, he delivered certain goods which were in his house to the defendant, who removed the goods from the house of *Hughes*, and sold them for the use of *Garraway*; that the defendant afterwards accounted to the assignees of *Garraway*, who likewise became a bankrupt, for the money arising from the sale of the goods; and that in all these transactions the defendant acted as servant to *Garraway*, and not otherwise.

The question was, Whether the plaintiff ought to recover the value of the goods?

It

It was holden, upon great consideration, that they ought.

And by *Lee Ch. J.*—As the property in the goods was, upon *Hughes's* being declared a bankrupt, vested in the assignees from the time of his committing the act of bankruptcy, the delivery of them to the defendant was a mere nugatory act. It is equally a conversion, to sell the goods of another person, which have been delivered to the seller by one not having a lawful authority to deliver them, as it is to take the goods of the other person and sell them; and it makes no difference, that the goods are, in such case, sold for the benefit of a third person; the owner being as much deprived of his goods, as if they had been sold for the benefit of the seller.

It has been said; that as the verdict finds, that the defendant in all the transactions stated acted as servant to *Garraway*, and not otherwise, he is not liable to the present action; the remedy of the plaintiffs being against *Garraway* or his assignees; But it is not found; that the sale of the goods, which was certainly a tortious act, was by the command of *Garraway*; and if it had been so found, the defendant would be nevertheless liable to the present action.

If a servant, by the command of his master, do a tortious act, the master is certainly liable to an action: But as the command of a master does neither justify nor excuse his servant in doing a tortious act, the servant is also liable. In the case of *Michael v. Alestree and another*, 2 Lev. 172. which was an action against a servant and his master, for an injury done by the servant's driving a pair of unruly
G coach

coach horses belonging to his master in *Lincoln's Inn Fields*, in order to break them, it was holden clearly; that the servant was liable to the action. The only doubt in that case seems to have been; whether, as the master was not present when the horses were driven, the action would lie against him: But it was holden that it would; and it was said by the court; it shall be intended, that the servant was sent to drive the horses there by his master. In the case of *Lane v. Cotton*, 12 *Mod.* 488. the following distinction, which, in our opinion, is well founded, was taken by *Holt Ch. J.* namely, that where an injury arises from the neglect of a servant, an action only lies against his master, for that a servant is not answerable, *quatenus* servant, for neglect: But that where an injury arises from the misfeasance of a servant, he is himself liable to an action, not *quatenus* servant, but as being a wrong-doer.

Rex vers. Purdue.

A soldier cannot be committed for leaving his family chargeable to a parish, if he be billeted in another parish.

THE defendant, being brought up by a *Habeas Corpus*, it appeared; that he was committed to *Bridewell* for running away, and leaving his wife and a child chargeable to a parish: But it likewise appeared; that he was a soldier; and that at the time of the commitment, he was billeted in another parish.

A rule was made for the discharge of the defendant.

And by *Lee Ch. J.*—This man, being a soldier, was obliged to reside in the parish wherein he was billeted; and consequently, his residing there can never be deemed a running away,

away, and leaving his wife and child chargeable to a parish, within the meaning of the 17 G. 2. c. 5.

Clarke vers. Darby.

UPON a rule to shew cause, why a prohibition should not be awarded, it appeared; that the charge in the libel in the ecclesiastical court was, that a certain quantity of wheat had been sent to be ground at a mill, and that a certain quantity had been taken out of the wheat sent to be ground for toll; and that the prayer of the libel was, that the occupier of the mill might account for the value of the tenth part of the wheat taken for toll, after deducting the expence of grinding the residue of the wheat.

No man is liable, as occupier of a corn mill, to the payment of a predial tithe.

The rule was made absolute.

And by the court.—As the demand in this case appears, upon the face of the libel, to be of a predial tithe, from a person as occupier of a corn mill, the ecclesiastical court ought not to proceed; it being a settled point, that no person is liable, as occupier of a corn mill, to the payment of a predial tithe.

Newton vers. Swymmer.

UPON a rule to shew cause, why common bail should not be accepted in an action of debt upon a judgment, it appeared; that there was special bail in the original action; and that a writ of error was brought upon the judgment.

Common bail ordered to be accepted in an action of debt upon a judgment.

The rule was made absolute.

G 2

And

And it was added thereto, by order of the court ; that the defendant should have leave to imparle, until there is a determination upon the writ of error.

Rex vers. Collyer and Capon.

A person may be discharged upon a *Habeas Corpus* from imprisonment under an illegal judgment.

THE defendants being brought up by a *Habeas Corpus*, it appeared ; that they were committed by an order of a court of quarter sessions, holden at *Hicks's Hall* ; and that in the commitment there were the following words : “ *William Collyer and Edmund Capon*, being convicted upon an indictment “ for assaulting *Thomas Smith, Esq* ; are committed to *New Prison, Clerkenwell*, for the “ space of one month next ensuing ; and to “ ask pardon upon their knees of the said “ *Thomas Smith*, at the place where the offence was committed ; and to cause an account of the said sentence to be printed in “ the *Daily Advertiser* ; and not to be discharged out of prison, until they have undergone such imprisonment, asked such “ pardon, and caused such account to be published ; and when discharged, to pay their “ fees severally, one pound, one shilling and “ eight pence.”

A rule was made for the discharge of the defendants.

And by the court—Every part of this judgment is illegal, except the imprisonment. It has been said ; that the proper way for the defendants to be relieved against any part of this judgment, is by a writ of error : But it would be very hard ; that the defendants should continue in prison under the illegal parts of this judgment, until they can obtain a reversal of those parts upon a writ of error.

Commings

Commins *vers.* The Mayor and Burgesſes
of Oakhampton.

UPON a rule to ſhew cauſe, why a new trial ſhould not be had in an action upon the caſe, it appeared; that the action was, for refuſing to admit the plaintiff to the freedom of the corporation of *Oakhampton*; that at the trial of the cauſe the chief queſtion was, whether there was a certain cuſtom in the borough, under which the plaintiff claimed a right of being admitted? And that the father of the plaintiff, who had obtained his freedom by ſervitude, was not admitted to prove this cuſtom.

A father is an admiſſible witneſs to prove a cuſtom, under which his ſon claims the freedom of a corporation.

The queſtion was, Whether the father was an admiſſible witneſs to prove this cuſtom?

It was holden that he was.

And by *Lee Ch. J.*—The perſon, to whom the remainder of an eſtate is, after the determination of a particular eſtate, limited by a will, cannot be admitted to prove the will; becauſe he has, although it be remote, a veſted intereſt in the matter in queſtion: But it has been always holden; that the ſon of the perſon, to whom a particular eſtate is deviſed by a will, may be admitted to prove the will; becauſe, although he may be under a bias, he has not a veſted intereſt in the matter in queſtion. Mere relationship, how near ſoever the relation may be, does not go to the competency of a witneſs, unleſs there be a veſted intereſt in the matter in queſtion. The bias, which a father is preſumed to be under in giving testimony in favour of his ſon, does certainly go to his credit: But a father is, in all caſes, a competent witneſs for his ſon, if he have

have not a vested interest in the matter in question. In the present case, the father was not immediately interested in the matter in question; nor could he at any future time become interested therein: The freedom of a corporation not being transmissible.

It was, on the contrary, clearly against the interest of the father, who was himself a freeman, to prove this custom; for by the establishment of a custom, under which others as well as his son might obtain their freedom, his own franchise would have been rendered less valuable.

Maynard *vers.* Hopkins.

An amendment cannot be of a matter, which, as it stands, is a discontinuance without consent.

A Demurrer to a plea in abatement, concluded with praying judgment of the action. Upon a rule to shew cause, why the plaintiff should not have leave to amend the demurrer, by making it conclude with praying judgment of *respondeas custer*, the amendment was consented to upon payment of costs; and a rule was made for leave to amend.

But it was, by the express order of the court, inserted in the rule, that the amendment was consented to.

And *Denison* J. said; that if there had not been a consent, it is very doubtful, whether the court could have given leave to amend; because the demurrer, as it now stands, is a discontinuance. He likewise mentioned the case of *Turner v. Cordwell*, Mich. 8. G. 2. in which he did himself move in this court, for leave to amend a matter, which, as it stood, was a discontinuance; and the court refused to give leave.

Gally

Gally *vers.* Glegg.

UPON a rule to shew cause, why a trial at bar should not be had, one question was; whether the court could order an action, the cause of which arose within the jurisdiction of the court of the county Palatine of *Lancaster*, and which was depending in that court, to be tried at the bar of this court? It was said at the bar; that there is only one instance of a trial at bar in such a case, which was the case of *Neale on the Demise of the Duke of Athole v. Wilding*; and that the trial at bar was, in that case, consented to.

Some doubt, whether an action depending in a court of a county Palatine can be tried at bar.

The rule was discharged; the action, upon the whole circumstances of the case, not being deemed a proper one to be tried at bar.

Wright J. entertained a doubt; whether this court can compel the inhabitants of a county Palatine, to attend as jurors at a trial at bar in this court?

The other justices expressly declared; that they did not mean to give any opinion upon this point.

Rex *vers.* Jermy.

UPON a motion for an attachment, it appeared; that when a rule was served upon the defendant, to shew cause why an information should not be filed against him; he said, take the rule back again to those from whom it came, and bid them wipe their backsides with it.

An attachment goes in the first instance, for speaking disrespectful words of the court.

An

An absolute rule was made for an attachment.

And by *Lee Ch. J.*—There are two cases, in which the court does always make a rule for an attachment, without making a rule to shew cause; namely, for non-payment of costs which have been taxed, and for speaking disrespectful words of the court.

Watkins vers. Hybert.

The changing of the *Venue* from an *English* to a *Welsh* county refused.

A Motion was made to change the *Venue*, in an action of assault and battery, from the county of *Middlesex* to the county of *Brecknock*.

The court refused to make a rule to shew cause.

And by *Lee Ch. J.*—It has been said; that rule, for changing the *Venue* from an *English* to a *Welsh* county, was made in the case of *Price v. Griffith*, *Trin.* 21 & 22 G. 2. and that another rule of the same kind was made in the case of *Smith v. Jones*, *East.* 23 G. 2. But if such a rule has ever been made, it must have been by surprise.

Mr. Ford, as *Amicus Curiae*, mentioned the case of *Moor v. Fernibaugh*, *Trin.* 19 G. 2. in which this court, after taking time to consider, refused to make a rule for changing the *Venue* from an *English* to a *Welsh* county.

Wicker

Wicker *vers.* Woodhall.

UPON a rule to shew cause, why the proceedings should not be set aside for irregularity; and why the defendant should not be discharged out of prison, it appeared; that at the time of delivering the declaration, which was delivered to the defendant in prison, a bill was not filed.

A declaration delivered to a prisoner is bad, unless a bill has been filed.

The rule was made absolute.

And by the court—A declaration against a defendant at large is good, although a bill has not been filed; because, if the bringing of writ of error, or any other reason, make the filing of a bill necessary, one may be filed at any time: But a declaration against a defendant in prison is bad, unless a bill has been filed, before it was delivered.

Armstrong on the Demise of Warnhouse
vers. Thrustout.

UPON a rule to shew cause, why judgment should not be entered against the casual ejector, it appeared; that the declaration was of last *Hilary* term; and that the notice to appear was, to appear in the present term.

The notice to appear to an action of Ejectment, must be to appear in the next term to that of which the declaration is.

The rule was discharged.

And by *Lee Ch. J.*—It has been said; that such a notice to appear, as has been given in the present case, would be good in the court of Common Pleas: But, however that may be, it is the settled practice of this court,
H that

that the notice to appear to a declaration in an action of ejectment, must be to appear in the term next to that of which the declaration is.

Foley *vers.* Langhorne, Clerk.

A Peer is liable to an attachment for not obeying the process of the court.

UPON a motion for an attachment against the Bishop of *St. Asaph*, for not returning a writ of *Fieri Facias de Bonis Ecclesiasticis*, the court had no doubt of their power to award an attachment against a Peer, for not obeying the process of the court: But it was doubted; whether, as it appears to be the duty of a Bishop's Chancellor, to take care that a return be made to every writ directed to the Bishop, it will not be more proper to move for an attachment against the Bishop's Chancellor: And the case of *Rex v. Loggen*, Chancellor to the Bishop of *Salisbury*, was mentioned; in which an attachment was awarded against *Loggen*, for not returning a writ of *Fieri Facias de Bonis Ecclesiasticis*, directed to the Bishop.

The precedents were ordered to be looked into; in order to see, how the practice in cases like the present had been.

Rex vers. Tew.

An attachment against an attorney for neglecting the cause of his client.

UPON a rule to shew cause, why an attachment should not be awarded against the defendant, it appeared; that *Tew*, who was an attorney, had received sixteen pounds from his client, who was plaintiff in a cause; that *Tew*, after giving notice of trial, had neglected to see council, or to attend the trial of the cause; and that in consequence of this neglect, his client was nonsuited, and afterwards thrown into a gaol.

The

The rule was made absolute.

But the attachment was ordered to lie in the office a few days; that *Tew* might have an opportunity of making satisfaction to his client.

Anonymous.

UPON a motion in arrest of judgment, in an action *qui tam*, it appeared; that the action was for a penalty given by one of the laws for the preservation of the game, and that the plaintiff, who was an infant, sued by *prochein amy*.

An infant cannot sue by *prochein amy* in an action *qui tam*.

As a ground for arresting the judgment, it was said; that by the 18 *Eliz. c. 5.* it is enacted, "that every informer, upon any penal statute, shall exhibit his suit in proper person, and pursue the same only by himself, or by his attorney."

A rule was made to shew cause, why judgment should not be arrested; which, no cause being shewn, was afterwards made absolute.

Spratt *vers.* Frederick.

UPON a rule to shew cause, why a *scire facias*, which had been sued out upon a judgment, should not be set aside; and why the goods levied should not be restored, it appeared; that a writ of error was delivered to the clerk of the errors, before the *scire facias* was sued out: But that bail was not put in at the time of suing it out.

A writ of error is a *superfedeas*, from the time of the delivery thereof to the clerk of the errors.

The question was, Whether a writ of error be a *superfedeas* to a *scire facias* upon a judgment, before bail is put in?

It was holden that it is.

And by the court—Upon the delivery of a writ of error to the clerk of the errors, it becomes a *superfedeas* to a *scire facias* upon a judgment; and it continues to be so for the space of four days after the allowance of the writ; after which time, if the plaintiff in error has neglected to put in bail, it ceases to be a *superfedeas*.

Michaelmas

Michaelmas Term,

26 Geo. 2. 1752.

Sir William Lee, *Chief Justice.*

Sir Martin Wright, }
Sir Thomas Denison, } *Justices.*
Sir Michael Foster, }

Emmerson vers. Haskins.

UPON a rule to shew cause, why the defendant should not, upon filing common bail, be discharged out of custody, it appeared; that in the affidavit of the plaintiff, upon which the defendant had been holden to special bail, it was sworn; that the defendant was indebted to the plaintiff in the sum of one hundred pounds, for converting and disposing of divers goods, the property of the plaintiff, to his own use.

On the part of the defendant, an affidavit was offered, wherein it was sworn; that the defendant, who was a custom-house officer, had seized the goods mentioned in the plaintiff's affidavit,

An affidavit, to explain the affidavit for holding to special bail, was not permitted to be read.

affidavit, as being prohibited goods; and that the goods were deposited in the king's warehouse, from whence they could not be had without a writ of delivery.

The court would not permit the affidavit to be read; and the rule was discharged.

And by *Lee Ch. J.*—It has been said; that the court of common pleas did in two instances allow affidavits to be read, to explain the affidavits for holding to special bail; and, in consequence of the explanatory affidavits, did discharge the defendants out of custody, upon entering common appearances, notwithstanding the affidavits of the plaintiffs were positive to debts of ten pounds: But whatever may have been done by that court, it has been the constant practice of this court, ever since the statute, by which an affidavit of debt of ten pounds is required, in order to hold to special bail, not to permit any affidavit to be read, either to contradict or explain the affidavit of the debt; and it is by no means proper, for the court to depart from its constant practice, although the adhering to it should, in the present case, be attended with some inconvenience to the defendant.

Griffith *vers.* Walker.

The *Venue* in an action against a sheriff for a false return, may be laid out of the county of which the defendant is sheriff.

IN the declaration, in an action upon the case, against the sheriff of the county of *Radnor*, for a false return to a writ of *Scire Facias*, it was alledged; that the writ was delivered to the sheriff at *Kingston* in *Herefordshire*, who then and there returned; that he had made known, &c. and the *Venue* was laid in the county of *Hereford*.

Upon

Upon a demurer to this declaration, the question was, Whether, as this action is for a false return by the sheriff of *Radnorshire*, the *Venue* could be laid in any other county than that of *Radnor*.

It was holden that it might.

And by *Lee Ch. J.*—It has been said; that as the office of sheriff is local, every act done by a man, as sheriff, must be done in the county whereof he is sheriff: But this is a mistake. A sheriff cannot do a compulsory act out of the county whereof he is sheriff: But he may make a return to a writ, or do any act which is not compulsory, out of that county. It appears from the case of *Gregson v. Heather*, Lord *Raym.* 1455. that the assignment of a bail bond, it being a transitory act, may be made by a sheriff out of the county whereof he is sheriff; and it was in that case holden; that the *Venue*, in an action upon the bail bond, was well laid in the county wherein the bail bond was assigned.

It has been said; that in the case of *Rex v. The mayor of Orford*, the court refused to change the *Venue*, in an action against the sheriff of *Suffolk* for a false return to a *Mandamus*, from the county of *Suffolk* to another county: But the court did not in that case refuse to change the *Venue*, because the sheriff could not make a return to the *Mandamus* out of his county; but because the *Venue* was very properly laid in the county of *Suffolk*, in which county the return was, in fact, made.

In the present case, as the return is alledged to have been made, and must be proved to have

have been made, in the county of *Hereford*; the question, whether the return be false, ought to be tried in that county; it being a maxim of law, that *ibi semper debet fieri tractatio, ubi Juratores meliorem habere possunt Notitiam*.

If there had been a motion in the present case, to change the *Venue* from the county of *Hereford* to the county of *Radnor*, the court would not have made a rule for changing it: In case the plaintiff would have undertaken to give material evidence in the county of *Hereford*; which, as the delivery of the writ, and the making of the return, were both in that county, he might very well have done.

Griffith *vers.* Williams.

If mutual actions will lie for the breach of two customs, one custom is not to be considered as parcel of the other.

IN an action of *Trespass*, for taking three gold rings, the defendant pleaded a custom, for the corporation of *Oswestry* to keep the bulwarks and prisons of the borough of *Oswestry* in repair; and likewise a custom, for the corporation to receive, in consideration thereof, from every inhabitant of the borough not being a burghers, a duty not exceeding twenty shillings, called *Tanastry*; and that he, as servant to the corporation, took the three rings, as a distress for the non-payment of this duty.

The plaintiff in his replication, traversed the custom of paying the duty; but did not give any answer as to the custom of keeping the bulwarks and prisons in repair.

Upon a demurrer to this replication, it was holden to be good.

And

And by *Lee Ch. J.*—Some objections have been made to the defendant's plea, which seem to have weight in them: But as we are of opinion, that the replication is good, it is not necessary to give any opinion as to the goodness of the plea.

It has been said, that, as the custom to pay the duty, called *Tancetry*, is alledged to be in consideration of keeping the bulwarks and prisons in repair, the custom to repair the bulwarks and prisons, and the custom to pay this duty, are to be considered as one entire custom; and if they are to be so considered, that the plaintiff ought to have traversed that part of the custom which relates to the repairs, as well as that part which relates to the payment of the duty. But we are of opinion; that the custom to keep the bulwarks and prisons in repair, and the custom to pay the duty, are to be considered as two distinct customs; inasmuch as there are two distinct duties; namely, a duty upon the corporation to keep the bulwarks and prisons in repair, and a duty upon the inhabitants to pay the duty; that for the breach of these two customs the corporation and the inhabitants have mutual remedies; and consequently, that it is not necessary for the person, who traverses one custom, to take any notice of the other.

In the case of *Harbin v. Green*, *Hob.* 189. a custom was alledged; for all the inhabitants of a city to grind their corn at the mill of *J. S.* and another custom, that in consideration thereof, *J. S.* was obliged to grind all the corn of the inhabitants. It was holden; that these are two distinct customs for the breach of which mutual actions will lie. In *Gray's case*, 5 *Rep.* 78. it is laid down generally;

rally; that where there are mutual remedies for the breach of two customs, one custom is to be considered as parcel of the other; but they are to be considered as distinct customs. It is likewise laid down in this case; that it is not necessary for the person, who would avail himself in pleading of one of two distinct customs, for the breach of which mutual actions will lie, to take any notice of the other custom.

Tubb vers. Tubb.

If a person, excepted to as bail do not justify; his name may be stricken out of the recognizance.

UPON a rule to shew cause, why the name of *John Dighton* should not be stricken out of a recognizance, it appeared; that this recognizance was entered into by *Dighton* and *J. S.* as bail in a writ of error; that *Dighton* being excepted to, and unable to justify, another person was added as bail, who did justify; that the judgment in the original action was affirmed; and that the person added as bail and *J. S.* being both insolvent, the defendant in error had brought an action upon the recognizance against *Dighton*.

The rule was made absolute.

And by *Lee Ch. J.*—After the defendant in error had excepted to *Dighton*, and another person was added as bail, who did justify, the recognizance, as to *Dighton*, was at an end. If *Dighton* had applied before this action was brought against him, to have his name stricken out of the recognizance, the court would certainly have ordered it to be done; and it is equally reasonable, that it should be now done.

Daubuz

Daubuz *vers.* Pender.

A Motion being made, for leave to amend the *Transcript* of a judgment of an inferior court, by the record of the judgment; and it being said, that a rule giving such leave, had been made in the case of *Read v. Charnley*, Mich. 4. Ann. the court ordered a search to be made for that rule.

The *Transcript* of a judgment of an inferior court may be amended.

By the rule made in the case of *Read v. Charnley*, which was at another day produced, it was ordered; that the matter be referred to the master, and that he, in the presence of the attornies of both parties, do amend the *Transcript* of the record to the writ of error annexed, according to the several proceedings had in the inferior court, to be produced before him by the parties.

A similar rule was made in the present case.

Kelly *vers.* Devereux.

UPON a rule to shew cause, why common bail should not be accepted, it appeared; that the plaintiff, who resided at *Cadiz*, had sent a letter of attorney to J. S. whereby J. S. was impowered to receive, and, if necessary, to sue for, a sum of money due from the defendant to the plaintiff; that the defendant had been holden to special bail upon an affidavit of J. S. in which it was sworn; that the defendant is indebted to the plaintiff in the sum of fifty pounds, as appears to this deponent, by the confession of the defendant, and by his promise to pay the same to this deponent.

An affidavit for holding to special bail must be positive to a debt of ten pounds.

The rule was made absolute.

And by *Lee* Ch. J.—It is a settled point; that the affidavit for holding to special bail must, without any reference, be positive to a debt of ten pounds.

Adcock *qui tam* *vers.* Gill.

IN an action *qui tam*, for exercising the trade of a worked weaver, in the city of *Norwich*, contrary to the 13 & 14 *Ch. 2. c. 5.* there was a special verdict.

After this verdict had been argued once upon the merits, *Denison* J. desired; that it might, at the next argument, be considered, whether the 13 & 14 *Ch. 2. c. 5.* which was made for regulating the manufacture of stuffs in the city of *Norwich* and in the county of *Norfolk*, be not a private statute, of which, as it is not in the present case pleaded, the judges cannot take notice; and he mentioned the case of *Rex v. Wild*, 2 *Keb.* 686. in which it was agreed by the court, that this statute is a private statute.

At the day upon which the verdict was to have been argued a second time, it was admitted; that the objection of Mr. Justice *Denison*, as supported by the case of *Rex v. Wild*, was too strong to be got over; and consequently that judgment must be entered for the defendant.

Rex

Rex *vers.* Rook.

UPON a rule to shew cause, why an order of bastardy, made by two justices, should not be quashed, one objection was; that there was not an adjudication in the order, that the child was born in the parish, for the relief of which the order was made.

A married woman cannot be admitted to prove that her husband had not access to her.

This objection was over-ruled.

And by the court—It must appear in an order of bastardy; that the child was born in the parish, for the relief of which the order is made, otherwise the order is bad for want of jurisdiction in the justices: But it has been holden frequently, and amongst other cases, in the case of *Rex v. Moravia, East. 15 G. 2.* that if it can be fairly collected, from an order of bastardy, that the child was born in the parish, it is sufficient; an express adjudication thereof not being necessary. In the present case, there is a recital in the order, that the child was born in the parish, which is certainly sufficient.

Another objection was; that the mother of the child, a married woman, was the only witness to prove, that her husband had no access to her. This objection was holden to be good, and the rule was made absolute.

And by the court—According to the old cases, a child born of a married woman could not be a bastard, if her husband were, during the time of her pregnancy, within the four seas: But it is at this day a settled point; that such a child may be a bastard, notwithstanding.

notwithstanding the husband was, during the time of his wife's pregnancy, within the four seas, if it appear, that he had no access to her.

But it is likewise a settled point; that the wife cannot be admitted to prove, that her husband had no access to her. Before the case of *Rex v. Redding*, which was Mich. 3 G. 2. it was doubted; whether a married woman could be admitted to prove, that a child born of her body was begotten by any other man than her husband; inasmuch as the tendency of the evidence was to bastardize her child. It was in this case holden; that a married woman may, *ex necessitate*, be admitted to prove this; which can very seldom, if ever, be proved by any other person: But it was likewise holden; that a married woman cannot be admitted to prove, that her husband had no access to her; because this may frequently be proved by another person.

Wood *vers.* Lord Biron.

The *Teste* of a *Distringas* may be amended by altering the date.

UPON a rule to shew cause, why the *Teste* of a *Distringas* should not be amended, by altering the date thereof, it appeared; that the *Distringas* bore *Teste* upon the 29th day of May; and that the *Venire Facias*, upon which it was founded, was not returnable until the 31st day of the same month.

The rule was made absolute.

And by *Lee Ch. J.*—It has been said; that the *Distringas*, as it now stands, is a perfect writ; and that altering the date of the *Teste* would amount to the making of a new writ: But there is no weight in this objection. The mistake in the date of the *Teste* of the *Distringas*,

tringas
cer,
Facias
bear
of th
Bates
Teste
Dis
men

U
peare
was
trial.
TH
A
ther
acco
of th
an in
natu
pelle
ney,
ther
ing

U
was
ed;

tringas is a mere *vitiam Clerici* ; for as the officer, by whom it was made out, had the *Venire Facias* before him, it was his duty to make it bear *Teste* on a day subsequent to the return of the *Venire Facias*. In the case of *Nevil v. Bates*, *Yelv.* 64. it was holden ; that both the *Teste* of a *Venire Facias*, and the *Teste* of a *Distringas* founded thereupon, might be amended.

Hayley *vers.* Grant.

UPON a rule to shew cause, why the trial of a cause should not be put off, it appeared ; that the attorney for the defendant was so ill, as not to be able to attend the trial.

The trial of a cause put off, because the attorney for the defendant was ill.

The rule was made absolute.

And by *Lee Ch. J.*—It has been said ; that there is no instance of a trial being put off, on account of the illness of the attorney for one of the parties : But, whether there be such an instance or not, it would be contrary to natural justice ; that a party should be compelled to have his cause tried, when the attorney, who has all along had the management thereof, is prevented by sickness from attending the trial.

Say *vers.* Lord Biron.

UPON a rule to shew cause, why the proceedings against the defendant, who was a peer, should not be set aside, it appeared ; that the suit was commenced by bill.

A suit against a peer may be commenced by bill

The

The question being, whether a suit could be commenced against a peer by bill? It was referred to the master, in order to have his report as to the practice of the court. The master reported; that it had for many years been the practice of the court, to commence a suit against a peer by bill, and to declare against him, not as being in the custody of the marshal: But, which is done in the present case, as having privilege of parliament.

The rule was discharged.

And by *Lee Ch. J.*—It has been said; that as the 12 & 13 W. 3. c. 3. by which statute liberty is given of commencing a suit by bill, against persons having privilege of parliament, does only mention *Knights, Citizens and Burgeses expressly*, the subsequent words, *or any other person having privilege of Parliament*, do not extend to a peer: Because a peer is a person of rank superior to all the persons, who are expressly mentioned: But we are of opinion; that the practice of the court, which has for many years been established, is founded upon a very right construction of the statute, and that it ought to be adhered to.

Jones qui tam vers. Bishop.

In an action for exposing a hare to sale, it is sufficient to alledge, that the defendant had a hare to his possession.

UPON a motion in arrest of judgment, it appeared; that the action was for the penalty of five pounds given by the 9 *Ann. c. 25.* for *exposing a hare to sale*; and that the allegation in the declaration was; that the defendant, not being a person qualified in his own right to kill game, nor being entitled thereto, under any person so qualified, had a hare in his possession.

The

The question was, Whether this be a sufficient allegation of the offence for which the penalty is given?

It was holden that it is.

And by *Lee Ch. J.*—It has been said; that although evidence of the defendant's having had a hare in his possession, would have been evidence of his exposing a hare to sale; yet, as the offence created by the statute is *exposing a hare to sale*, it ought to have been alledged, that the defendant did *expose a hare to sale*: but we are of opinion, that the allegation is sufficient; it being enacted, by the second paragraph of the statute, “that if a hare shall be
“found in the possession of any person what-
“soever, not qualified to kill game in his
“own right, nor intitled thereto under some
“person so qualified, the same shall be ad-
“judged, deemed and taken to be an ex-
“posing thereof to sale, within the true
“intent and meaning of this act.”

Rex vers. Sheppard.

A Motion being made, upon the last day of this term, to quash the indictment against the defendant; *Lee Ch. J.* had at first some doubt, whether a motion to quash an indictment could be made upon the last day of a term: But the court being informed by the secondary of the crown office, that motions to quash indictments had frequently been made upon the last days of term, a rule to shew cause was made.

A motion to quash an indictment may be made upon the last day of a term.

K

The

'The fecondary did, at the fame time, inform the court, that motions to quafh orders of feffions, or orders of juftices of the peace, had not been allowed to be made upon the laft days of terms.

Hilary

Hilary Term,

26 Geo. 2. 1753.

Sir William Lee, *Chief Justice.*

Sir Martin Wright,
Sir Thomas Denison, } *Justices.*
Sir Michael Foster,

Goodlittle on the Demise of Hord *vers.*
Stokes.

IN a case reserved in an action of ejectment it was stated; that *A. B.* being seised in fee of the premises in question, conveyed them by lease and release to trustees, to the use of himself and *C. D.* his wife for life, and after the decease of the longer liver of them, to the use of all and every the children of *J. S.* on the body of the said *C. D.* begotten and to be begotten, and the heirs and assigns of such children, equally to be divided amongst them; and that *A. B.* who survived the said *C. D.* is dead, and has left two children begotten upon the body of the said *C. D.*

A tenancy in common is created by the words equally to be divided, in a deed to uses.

K 2

The

The question was, Whether the two children took as tenants in common, or as joint tenants?

It was holden; that they took as tenants in common.

And by *Lee Ch. J.*—It has been for some time a settled point, that if a devise be to two, equally to be divided betwixt them, they take as tenants in common.

It has been observed; that the intention of the grantor is not so much to be regarded in the construction of a deed at the common law, as the intention of the testator is in the construction of a will: But this observation, supposing it to be well founded, does not apply to the present case, in which the question arises upon a deed to uses, and not upon a deed at the common law.

In the case of *Leigh v. Brace*, *Carth.* 343. it is laid down; that as much regard is to be had to the intention of the grantor in construing a conveyance to uses, as in construing a will; for that the same strictness is not required in the construction of a conveyance to uses, as in the construction of a conveyance at the common law.

In the case of *Fisher v. Wegg*, *Lord Raym.* 622. it was holden by the opinion of *Turton J.* and *Gould J.* that if a man surrender a copyhold estate to the use of *A. B. C.* and *D.* his children, equally to be divided amongst them and their respective heirs and assigns for ever, the children take as tenants in common.

It

It has been truly said, that *Holt* Ch. J. did in this case differ in opinion from *Gould* and *Turton*: But the difference did not consist, in his being of opinion, that the intention of the grantor is not to be regarded in the construction of a deed to uses; but in his being of opinion, that a surrender of a copyhold estate ought to be construed in the same manner as a grant at the common law.

In the case of *Rigden v. Vallier*, March 25, 1751, in the court of Chancery, it appeared; that J. S. had executed a deed, in which were the following words, "In consideration
" of natural love and affection to my wife
" and two daughters, and for the settling and
" assuring all my real and personal estate
" upon them, I give, grant and confirm unto
" my two daughters the rents and profits of
" my estate, during the life of my wife,
" equally to be divided between them, paying
" five pounds a year to my wife, my said
" two daughters to have the said estate to
" them and their heirs for ever, equally to
" be divided between them." That the wife died during the life of J. S. and that the two daughters both survived J. S.

The decree in this case was, that the two daughters took as tenants in common, and by Lord *Hardwicke*, Chancellor; as the estate thereby created was to take effect *in futuro*, and there was no livery, this deed cannot operate as a grant at the common law: Because no estate of freehold, to commence *in futuro*, can be created by grant at the common law, unless there be livery. As the estate thereby granted, was not to take effect until the death of the grantor, this deed may, perhaps, operate as a testamentary schedule; and, if it
may,

may, there is no room for doubt, that the intention of the testator is to be regarded in the construction thereof. If this deed do not operate as a testamentary schedule, it must operate as a covenant to stand seised; the consideration therein expressed being natural love and affection; which is not a good consideration in any other deed than a covenant to stand seised. If it do operate as a covenant to stand seised, it is a stronger case for holding that the intention of the grantor ought to be regarded in construing it, than the case of *Fisber v. Wegg*, which has been cited and relied upon. It is indeed said, in *Eq. Ca. Abr.* 291. that the judgment in the case of *Fisber v. Wegg* was reversed: But this is a mistake, for upon a search being made by my order it does not appear, that any writ of error was brought.

It has been said; that as the determination in the case of *Fisber v. Wegg* was contrary to the opinion of *Holt Ch. J.*—that case is not of much authority. The answer I shall give to this is, that, although I have the greatest reverence for the opinions of Lord Chief Justice *Holt*, I cannot help saying; that upon mature consideration of the arguments in the case of *Fisber v. Wegg*, it appears to me, that the arguments of the chief justice are very artificial and refined: But that those of the two justices are much more agreeable to natural reason. If the intention of *J. S.* is to be regarded in construing this deed, the construction of it must be, that the daughters took as tenants in common; for if the construction should be, that they took as joint-tenants, the intention of *J. S.* which certainly was to provide for the heirs of his daughters, as well as for the daughters themselves, would not be answered.

It

It appears from these authorities, that the intention of the grantor is to be regarded in the construction of a deed to uses; and if this be so, there is not in the present case any room for doubt; it being the manifest intention of *A. B.* that the heirs and assigns of all his children begotten upon the body of *C. D.* should take, as well as the children themselves. In order to effectuate this manifest intention, it is necessary for the court to hold, that the two children left by *A. B.* took as tenants in common; for if it should be holden, that they took as joint tenants, only the heirs and assigns of that child which should survive could take.

It is not necessary, to go further in the present case, than to determine, that the words *equally to be divided*, in a deed to uses, do create a tenancy in common: But if it were necessary, the court would have the sanction of a very great man's opinion for going further.

In the case of *Rigden v. Vallier*, which has been already mentioned, the only point directly in question was, whether the words *equally to be divided* in a testamentary schedule, or a covenant to stand seised do create a tenancy in common; and consequently the decree could only be as to this point: But it may be fairly inferred, that, if the case had required it, the decree would have been, that the same words, or words of the like import, in a deed at the common law, do create a tenancy in common: For Lord *Hardwicke* expressed himself to the following purport: I take it to have been long settled, that the words *equally to be divided*, or the word *equally*, or the words *share and share alike*, in a will, do create a tenancy in common; and I do not know of any solemn determination, that the

same

same words, or words of the like import, in a deed, do not create such a tenancy. It is certain, that no technical words are necessary to the creation of a tenancy in common; and consequently, a greater latitude may be exercised in determining, whether such a tenancy be created by the words which are used. It is said, 1 *Inst.* 190, *B.* that if a verdict find, that a man hath *duas Partes Manerij in tres Partes dividendas*, it seemeth, that he is a tenant in common by the intendment of the verdict. If these words in a special verdict would create a tenancy in common by intendment, there does not appear to be any good reason, why the same words, or words of the like import, in a deed at common law, should not create such a tenancy. Upon looking into all the cases upon the point, and upon the best consideration I have been able to give it, I am inclined to be of opinion, that the words equally to be divided, or any words of the like import, whether in a will or in a deed, at the common law, do create a tenancy in common.

Rex vers. Bridges.

The affirmation of a Quaker is not to be admitted in criminal proceeding.

UPON a motion to revive an attachment, the affirmation of a Quaker was offered, to shew the right of the assignees of a bankrupt to some money awarded by arbitrators to be paid.

The affirmation was not permitted to be read.

And by the court—The affirmation of a Quaker is not to be admitted in any criminal proceeding whatsoever.

Maclish

Maclish *vers.* Ekins.

IN a case reserved, in an action of *Trover*, it was stated; that the plaintiff, being owner of a ship, let it to the commissioners of the navy; that the plaintiff, who resided in *Scotland*, by a letter of attorney empowered *Todd*, who resided in *London*, to receive all freight and profits due to him as owner of the ship, to give discharges for the same, and do every thing relative to the premises, which the plaintiff himself could lawfully do; that *Todd* received from the commissioners of the navy a navy bill for twelve hundred pounds, to be paid to the plaintiff and his assigns; that *Todd*, after having pawned the navy bill to *Honywood* and *Fuller*, ordered their clerk to sell it, and place the money arising from the sale to his account; that the clerk sold it to *Hawkes* at a fair market price, and placed the money to *Todd's* account; that *Hawkes* sold it to the defendant at a fair market price; that *Todd*, in a bill of sale of his goods, which he afterwards executed to the defendant, called himself agent for the plaintiff; and, after reciting the sale of the navy bill to the defendant, gave him full power to receive the money thereupon due, and covenanted to maintain his claim thereto against all persons whatsoever; and that the action was for the conversion of the navy bill.

The property in a navy bill cannot pass without an assignment of the navy bill.

The question was, Whether *Todd* had an authority, either to pawn or sell the navy bill?

It was holden that he had not.

And by the court—It has been said; that *Todd* had an interest in the navy bill, as well

as an authority to receive it: But we are of opinion, that he was only empowered by the letter of attorney to act as agent for the plaintiffs.

It has been said; that if *Todd*, instead of a navy bill, had received money, and paid it away, the plaintiff could not have recovered the money from the person to whom it was paid: But the reason why the plaintiff could not have recovered in that case is, that money has no ear-mark, and not that *Todd* would have had a right to pay it away; for, as the money would have been received for the use of the plaintiff, the paying of it away by *Todd* would have been unlawful.

It has been very truly said; that the property in a bank note, if delivered in the course of trade for a valuable consideration, does pass by the delivery: But it is as true; that the property in a navy bill cannot pass without assignment, and as *Todd* had no power to assign the navy bill, the maxim *Caveat emptor* applies to this case. The defendant could not be ignorant of *Todd* being an agent for the plaintiff, for he is so called in the bill of sale to the defendant; and it appears, from the covenant entered into by *Todd*, which was to maintain the claim of the defendant to the navy bill against all persons whatsoever, that the defendant did himself doubt of *Todd's* authority to dispose thereof.

Battie *vers.* Brown.

A mistake in the declaration is not a good excuse for not trying a cause pursuant to an undertaking.

AFTER one rule to shew cause, why there should not be judgment as in the case of a non-suit, had been discharged upon an undertaking peremptorily to try the cause at the next assizes, a second rule was made

made to shew cause, why there should not be such judgment.

Upon shewing cause against this rule, it appeared; that after the undertaking to try the cause at the next assizes, a mistake had been discovered in the declaration, which was for the sale of a gelding; whereas the fact was, that the plaintiff had sold a mare to the defendant; that as this mistake was discovered, and there was no count for goods sold, the cause was not tried; and that notice had been given, before the present rule was moved for, of a motion for leave to amend the declaration.

The rule was made absolute.

And by *Wright J.* and *Denison, J.* (*Lee* Chief Justice being absent)—The plaintiff ought to have been satisfied, that this declaration was right, before he undertook peremptorily to try the cause.

But *Foster J.* said; that it would, in his opinion, be rather too rigid a construction of the statute to hold, that the plaintiff, under the circumstance of this case, was obliged to try his cause at the next assizes.

Rex vers. Bow.

UPON a rule to shew cause, why an attachment should not be awarded for non-performance of an award, the affirmation of a Quaker was offered on the part of the defendant.

It was not permitted to be read.

L 2

The affirmation of a Quaker is not to be admitted in a criminal proceeding in exculpation of the defendant.

And

And by the court—It has been said; that this affirmation is in exculpation of the defendant: But the affirmation of a Quaker can no more be admitted on the part of the defendant, on shewing cause against the present rule, than it could upon the part of the prosecutor, upon the motion for the rule.

Tourville *vers.* Nash.

The issue and *Nisi Prius* roll may be amended by the plea roll.

UPON a rule to shew cause, why the issue delivered. and the *Nisi Prius* roll should not be amended, the question was, Whether both these should be amended, by the plea roll, by striking out the words, *in a Plea of Trespass upon the Case*, and inserting the words *in a Plea of Debt*?

It was holden; that both might be amended by the plea roll.

Rex *vers.* Bedell.

An absolute rule for the production of the book of a corporation at the trial of an information.

UPON an affidavit that there were many interlineations and obliiterations in a book of a corporation, wherein entries relative to elections were made, an absolute rule was made, for the production of the book at the trial of an information in the nature of a *Quo Warranto*.

And by the court—It is neither usual, nor reasonable, to make a rule to shew cause in a case like the present.

Anonymous.

Anonymous.

UPON a motion to change the *Venue*, it did not appear from the affidavit, that the cause of action, if any, did not arise elsewhere out of the county, to which the motion was to change its *Venue*.

The form of an affidavit for changing the *Venue*.

The affidavit was holden to be insufficient.

And by the court—In order to change the *Venue*, it must appear from the affidavit, that the cause of action, if any, does arise in the county to which the motion is to change it, and not in the county where the *Venue* is laid, or elsewhere out of the county to which the motion is to change it; for the cause of action may arise out of the realm; in which case the *Venue* ought not to be changed; because the action may as well be tried in the county where the *Venue* is laid, as in any other county where the cause of action did not arise.

Anonymous.

UPON a rule to shew cause, why the judgment signed should not be set aside for irregularity, it appeared; that the judgment was signed; because the plaintiff, who was an attorney, refused to pay for the plea.

An attorney is not bound to pay for the plea, in a cause wherein he is plaintiff.

The rule was made absolute.

And by the court—An attorney is not obliged to pay for the plea in a cause, wherein he is himself plaintiff.

Anonymous.

Anonymous.

A Rule was made absolute, for an information against the parish officers of *Cheltenham*, for forcibly entering a woman's house, and removing her son who was ill of the small pox, when the distemper was almost at the height; by which the son was much frightened, and before his death, which happened soon after the removal, declared, that if he should die, the removal would be the cause of his death.

Pike vers. Corbin.

UPON a motion to stay the proceedings, until security should be given for the payment of costs, in case the defendant should become entitled to any, it appeared; that the action, which was for the mesne profits of the premises recovered in an action of ejectment, was brought in the name of the nominal plaintiff in the action of ejectment.

A rule was made to shew cause, which, no cause being shewn, was afterwards made absolute.

Cranston vers. Clarke.

The land-tax may be deducted by a tenant, unless there be an express agreement that it shall not.

IN a case reserved, in an action of covenant, it was stated; that the rent reserved in a lease was to be paid without any deduction or abatement whatsoever.

The question was, Whether the lessee had a right to deduct out of the rent the money paid by him for the land tax?

It was holden that he had.

And by the court—As every tenant is enabled by the land tax act, to deduct the money paid for the land tax out of the rent paid to his landlord, this money may always be deducted, unless there is an express agreement that it shall not.

Rex vers. The Burgeses of Caermarthen.

IN order to obtain a trial at bar, it was alleged in an affidavit; that the cause is expected to be long and difficult; and that the matter in question is of great value.

A trial at bar ought not to be granted upon a general allegation of difficulty in the cause.

The affidavit was holden to be insufficient.

And by the court—The granting of a trial at bar is entirely in the discretion of the court, and such a trial ought not to be granted without good reason: Because it is very expensive to the parties, and the business of the other suitors is thereby delayed. Neither the length of a cause, nor the value of the matter in question, is a sufficient ground for granting a trial at bar; and in order to obtain one upon the account of difficulty, it is not sufficient to say generally in an affidavit that the cause is expected to be difficult: But the particular difficulty which is expected to arise ought to be pointed out, that the court may judge, whether it be sufficient for the granting of a trial at bar.

Easter

Easter Term,

26 Geo. 2. 1753.

Sir William Lee, *Chief Justice.*

Sir Martin Wright,
Sir Thomas Denison, } *Justices.*
Sir Michael Foster,

Catling *vers.* Bowling.

Leave given
to bring a
book into
court in an
action of *Tro-*
ver.

UPON a motion for leave to bring a book into court, for the conversion of which an action of *Trover* was brought, it appeared; that the book, entitled *Memoirs of a Woman of Pleasure*, had been lent by a bookseller to some young ladies at a boarding school; that the defendant's wife, who was mistress of the school, took it from them and sent it to the bookseller, with a request that it might not be again lent to the young ladies; and that the book being afterwards found in the possession of one of the young ladies, the defendant's wife took it from her and kept it.

A rule

A rule was made to shew cause, why, upon bringing the book into court, the proceedings should not be stayed; and it is probable, that the plaintiff thereupon agreed to drop his action; for the court never heard any more of the rule.

Adams vers. Freeman and Wynne.

IN an action of *Trespass*, the plaintiff declared in one court, for an assault and false imprisonment for the space of fourteen days; and in another, for an assault and false imprisonment for the space of three months.

It is not necessary to set out the proceedings in an inferior court, in a plea to an action of trespass in a superior court.

The defendant *Freeman* pleaded in his justification, that a plaint was levied and process prayed at his suit in an inferior court, that such proceedings were thereupon had, that a *Capias* was awarded; that the plaintiff, by virtue of this *Capias*, was arrested and detained in custody fourteen days; and that he was then brought into court, and committed for the residue of the term of three months.

The other defendant, who was the officer by whom the arrest was made, pleaded a like plea in his justification.

Upon a demurrer to these pleas, the question was, Whether it was necessary for both or either of the defendants to shew, that a summons issued before the *Capias* was awarded?

The pleas were both holden to be good.

M

And

And by *Lee Ch. J.*—It was heretofore necessary, for the plaintiff in an action in the inferior court, who would justify an imprisonment under a *Capias* awarded by that court, to set out in his plea of justification, all the proceedings anterior to the awarding of the *Capias*: But it was never necessary, for the officer by whom the arrest was made to do this. It has, however, for some years past been holden sufficient, for the plaintiff in the action in the inferior court to alledge in such plea, that a plaint was levied and process prayed in the inferior court; and that *superinde taliter Processum fuit*, that a *Capias* was awarded; without setting out all the proceedings between the levying of the plaint and the awarding of the *Capias*.

In the case of *Gwynne v. Poole*, *Lutw.* 943. it is laid down, that it is sufficient to do this; and it was in that case holden expressly, that it is not necessary to shew in such plea, that a summons issued before the awarding of the *Capias*. The authority of the case of *Gwynne v. Poole*, has been frequently recognised; and the authority of the case of *Read v. Wilmot*, 2 *Vent.* 222. in which it was holden, that it is necessary to shew in such plea, that a summons issued before the *Capias* was awarded, has been as frequently denied.

It has been said; that it is not alledged in the plea of *Freeman*, that the cause of the action in the inferior court arose within the jurisdiction of that court: But it is alledged, that a plaint was levied in the inferior court, for a cause of action arising within the jurisdiction of that court; this is a sufficient allegation, that the cause of that action did arise within the jurisdiction of that court,
that

that the fact whether it did arise therein might have been traversed. It is moreover laid down in the case of *Gwynne v. Poole*, that it is not necessary to alledge expressly, in a plea similar to that in the present case, that the cause of the action in the inferior court arose within the jurisdiction of that court; for that it is sufficient, if it appear in the plea, that the cause of that action did arise within the jurisdiction of that court.

Griffith *vers.* Griffith.

IN an action of debt brought by an administratrix, it appeared from the declaration; that her letters of administration were granted by the Bishop of *Bristol*.

The defendant pleaded; that the plaintiff's intestate died upon the high sea, out of the jurisdiction of the Bishop of *Bristol*; and that the letters of administration were upon that account void.

Upon a demurrer to this plea, the letters of administration were, upon great consideration, holden to be good.

And by *Lee Ch. J.*—The right of granting letters of administration is not founded upon the dying of an intestate within a diocese, but upon his leaving goods therein.

There is a great mistake in the report of the case of *Hiliard v. Cox*, 1 *Salk.* 37. in which it is said; that a plea similar to that in the present case was holden to be good; for it appears, from the pleadings in that case, 2 *Salk.* 750. that the plea was not that the plaintiff's intestate was, at the time of his

The right of granting letters of administration is not founded upon the dying of an intestate within a diocese, but upon his leaving goods therein.

death, resident in another diocese: But that the debtor to the plaintiff's intestate was, at the time of the intestate's death, resident in another diocese.

As there was a debt upon simple contract due to the plaintiff's intestate at the time of his death, from a person who at that time resided within the diocese of *Bristol*, this, agreeably to what is laid down in the case of *Yeomans v. Bradshaw*, *Carth.* 374. gave a right *prima facie* to the Bishop of *Bristol* of granting letters of administration; and we will not intend that the plaintiff's intestate left *Bona Notabilia* in any other diocese. We will, on the contrary, rather intend, for the sake of supporting the letters of administration, that the plaintiff's intestate did not leave *Bona Notabilia* in any other diocese.

Young *vers.* Lynch.

A prebendary is not entitled to share of the revenues of the church before it is divided, unless some part thereof be allotted to his prebend in particular.

IN a case reserved, in an action of *Assumpsit*, it was stated; that the action was for money had and received to the use of the plaintiff; that upon the 24th day of *June*, 1746, a prebend of *Canterbury* was granted by the king to the plaintiff; that upon the same day the dean and chapter were commanded to assign the plaintiff a stall in that cathedral; that upon the 27th day of the same month the plaintiff was admitted a prebendary; that upon the 28th day of the same month he was installed; that upon the 24th, 25th, 26th and 27th days of the same month a chapter was holden, and fines were set and paid, upon the renewal of leases, to the amount of two thousand nine hundred and eighty-nine pounds, three shillings and six-pence; that by the

statutes

statutes of the church, the money received for fines, upon the renewal of leases, is to be divided into shares; of which two are to be paid to the dean and one to each prebendary; that the money received for the fines paid, upon the days before mentioned, was divided into thirteen shares; that the defendant, who was dean, received two shares, which amounted to four hundred and fifty-nine pounds, seventeen shillings and five-pence halfpenny; that if this money had been divided into fourteen shares, and one of them had been paid to the plaintiff, two shares would have amounted to no more than four hundred and twenty-seven pounds, two shillings and six-pence: And consequently, the dean would have received thirty-two pounds, sixteen shillings and eleven-pence halfpenny less than he did receive; that there are very few instances of a prebendary's having received a share of the fines paid upon the renewal of leases, which were set at a chapter holden prior to his installation; and that in every one of these instances, it is expressed in the act of the chapter, that the share was paid to the prebendary by the benevolence of the Dean and Chapter.

One question was, whether the plaintiff had a right to a share of the money paid for fines upon the 24th, 25th, 26th and 27th days of *June*?

It was holden, upon great consideration, that he had not.

And by *Lee Ch. J.*—The claim of the plaintiff is founded upon the 28 *H. 8. c. 11. par. 4.* by which it is provided, that the revenue and profits of a prebend, growing due during a vacancy of the prebend, shall be paid to the next person who shall be lawfully admitted

to

to the prebend. Under this statute, the person admitted to a prebend is entitled to such part of the revenue of the church, growing due during the vacancy of the prebend, as is allotted to that prebend in particular : But no part of the revenue of the church of *Canterbury* is allotted to any prebend in particular, except the annual stipend of seventeen pounds, six shillings and eight-pence, which, by the 16th chapter of the statutes, is to be paid to every prebendary *pro corpore præbendæ suæ*. The residue of the revenue is the joint property of the dean and chapter, as being an aggregate body; and no member of this body has any right to any part thereof, before it is divided into shares. In the case of *Philips v. Bury*, *Skin.* 488. it is laid down; that the head of a college cannot maintain an assize for any part of the revenue of the college, until his part thereof is ascertained by a division of the revenue.

No positive opinion was given in the case of *Mosely v. Warburton*, *Lord Raym.* 265. But *Holt* Ch. J. expressed himself to the following purport; If a prebendary be a sole body, the Bishop, upon a *levari facias de bonis ecclesiasticis*, may sequester his prebend: But if a prebendary be a member of an aggregate body, composed of a dean and chapter, the bishop ought to return *nulla bona ecclesiastica*: Because such prebendary is not entitled to any part of the revenue of the church, before a division is made thereof.

Another question was, Whether, if the plaintiff had a right to a share of the money paid for fines upon the 24th, 25th, 26th and 27th days of June, he ought to recover the sum of thirty-two pounds, sixteen shillings and eleven-pence halfpenny in the present action?

As

As the opinion of the court was against the plaintiff upon the other question, no opinion was given upon this.

Griffith *vers.* Williams.

UPON a rule to shew cause, why a verdict upon an issue joined on a plea of *not guilty*, and an assessment of damages, upon a judgment on a *demurrer*, by the jury who tried issue, should not be set aside, it appeared; that after the notice of trial had been given, the defendant's attorney, upon the last continuance day, entered a *relicta verificatione* as to the plea of not guilty, and gave notice thereof to the plaintiff's attorney.

A defendant cannot wave his plea upon the last continuance day, without leave of the court.

The question was, Whether the plaintiff could proceed to the trial of the issue, after notice that a *relicta verificatione* was entered as to the plea of not guilty.

It was holden that he might.

And by the court—The defendant could not wave his plea of not guilty upon the last continuance day, without leave of the court, and consequently the plaintiff was not obliged to regard the notice of waver thereof. The case, which has been cited, goes no further than to shew, that a defendant may, without leave of the court, wave his plea before the adjournment day.

Stonehouse *vers.* Vowell.

A defendant cannot demur unless for good cause, after an undertaking to plead issuably.

UPON a rule to shew cause, why the judgment should not be set aside for irregularity, it appeared; that after the defendant had obtained an order from a judge for time to plead, upon an undertaking to plead an issuable plea, and take short notice of trial, he demurred generally.

The rule was discharged.

And by the court—A demurrer for good cause would certainly have been an issuable plea within the meaning of the defendant's undertaking: But as the demurrer is a general one; and as there does not appear to be any good cause for demurring, the court ought to intend, that it was a trick to postpone the trial of the cause.

Rex *vers.* The Inhabitants of Eakring.

An apprenticeship is determined by the death of either master or apprentice

IN an order of sessions it was stated; that the *Pauper* was bound an apprentice, by parish indentures, in the parish of *Eakring*, until he should attain the age of twenty-one; that he ran away from his master, and never returned to him; that his master died in *June* 1749; that at *Michaelmas* 1749 he let himself as a servant for a year in the parish of *Selson*, and served the year; that at *Martinmas* 1750 he let himself to the same master for another year and served it; that he received the wages for both years service himself, no notice being taken of him by the executors of his master; and that in *January* 1750, he attained the age of twenty-one years.

The

The question was, Whether the *Pauper* gained a settlement in *Selson*?

It was holden that he did.

And by the court—It has been said; that the apprenticeship continued, notwithstanding the death of the master: But we are of opinion, that it did not. In the case of *Rex v. Peck*, *Salk* 66. it is said by *Eyre* J. who was afterwards chief justice of the court of common pleas, that an action of covenant lies upon an indenture of apprenticeship against an executor; because no inconvenience follows therefrom, in as much as the executor may defend himself by pleading no assets: But that the apprenticeship, it being a personal trust between the master and apprentice, is determined by the death of either; because the end and design thereof can no longer be obtained.

Trinity Term,

27 Geo. 2. 1753.

Sir William Lee, *Chief Justice.*

Sir Martin Wright,
Sir Thomas Denison, } *Justices.*
Sir Michael Foster,

Rex vers. Furser.

A new trial
granted after
an acquittal
upon an in-
dictment.

UPON a rule to shew cause, why a new trial should not be had in an indictment, it appeared; that the indictment had been removed by the defendant; that his clerk in court had entered notice of trial in the office book; and that the defendant had been acquitted.

The rule was made absolute.

And by the court—It has been said; that as the defendant was obliged, by the recognizance entered into upon removing the indictment, to try the issue that should be thereupon joined at the next assizes, it was not
necessary

necessary to give any notice of trial : But it is by the 5 *W. & M. c. 11.* provided, that notice of trial shall in such case be given by the defendant.

It has been said ; that if any notice of trial were necessary, the entering of notice in the office book was sufficient notice : But it is by the same statute provided, that notice of trial shall, in such case, be given by the defendant to the prosecutor or his clerk in court.

Hampson *vers.* Adshhead.

UPON a motion for the master to review his taxation of costs in an action of *trefpass*, it appeared ; that the plaintiff had declared in one court, that the defendant assaulted and beat him, and threw him down upon the ground, which was covered with water, and *thereby* damaged his cloaths ; that there was a general verdict for the plaintiff, with damages under forty shillings : And that the judge, before whom the cause was tried, had not certified that the battery was sufficiently proved.

Full costs are not to be paid for a consequential injury to a personal chattel, if the damages are under forty shillings, and there is not a certificate.

The question was, Whether the plaintiff ought to recover any more costs than damages ?

It was holden that he ought not.

And by *Lee Ch. J.*—The damaging of the cloaths is charged in this declaration, as a consequence of the assault and battery, and cannot be so separated therefrom, as to make it an independent injury to a personal chattel. And by *Denison J.* the word *thereby* means the same as the words *per quod*, and it has been

frequently holden, that a plaintiff in an action of *trespass* is not entitled to full costs for an injury to a personal chattel laid with a *per quod*, unless damages are found to the amount of forty shillings, or there be a certificate. If it had been alledged that the defendant threw water upon the plaintiff's cloaths, and that the cloaths were thereby damaged, the plaintiff would have been entitled to full costs; because the throwing of the water upon the cloaths would, in that case, have been an independent injury to a personal chattel.

Rex vers. The Inhabitants of Steyning.

A parish is not obliged to repair highway, which is not much wanted for the use of the publick.

UPON a motion for an information against the defendant, for not repairing a highway in the parish of *Steyning*, it appeared; that the highway was out of repair; that the parish had always repaired it; and that two bills of indictment for not repairing it, which had been preferred to two grand juries, had been found no true bills: But it likewise appeared; that the highway was only about one hundred yards in length; and that another highway in the town of *Steyning*, near this, and so little a way about as to be almost equally convenient to the publick, was in good repair.

Wright J. was of opinion, that a rule to shew cause ought to be made; for that all highways ought to be kept in repair.

The other three justices being of a contrary opinion, no rule was made.

And by them—The court ought never to give leave to file an information, for not repairing a highway, unless it appear; that it is of consequence to the publick that the highway

way should be repaired ; and that the grand jury have been guilty of very gross misbehaviour in not finding a bill of indictment a true bill. No misbehaviour of either of the grand juries is charged in the present case ; and it would be a great hardship to compel the parish to repair this highway, when it appears, that another highway, almost equally convenient to the publick, is in good repair. There are in many parishes ways which may be well deemed highways, and yet are suffered to be out of repair ; because the repairing of them would be of very little consequence to the publick, and it would be an immense expence to the parishes. There is another reason, why the court ought never to give leave to file an information for not repairing a highway, unless it be a case of great enormity ; namely, that the fine set, on a conviction upon an information for not repairing a highway, cannot be expended in repairing the highway ; whereas the fine set, on a conviction upon an indictment for not repairing a highway, is always to be expended in the repair of the highway.

Newland and others *vers.* Osomond.

IN an action of debt upon a bond, the condition of the bond appeared to be ; that the defendant should indemnify the churchwardens and overseers of a parish, and their successors, from all expence on account of the birth, maintenance and education of a bastard child.

The putative father of a bastard child may maintain it himself.

The defendant pleaded ; that, from the time of the birth of the child to the time of its being put out to nurse by the plaintiffs, who

who were the churchwardens and overseers of the parish, he had maintained it; that at the time of putting the child out to nurse he offered to maintain it, and has been ever since, and still is, ready to maintain it; but that the plaintiffs at that time refused, and still do refuse, to permit him so to do; that the plaintiffs of their own wrong put the child out to nurse; and that if they are damaged, the damage was occasioned by their own wrong.

The plaintiffs replied; that for the space of three weeks after putting the child out to nurse the defendant did not maintain it; but they were obliged to maintain it, whereby they are damnified.

Upon a demurrer to this replication, *Lee Ch. J. Wright, J. and Denison J.* were of opinion, that the putative father of a bastard child has a right to maintain it himself.

And by them—It is by the 18 *Eliz. c. 3.* provided, that an order may be made for the relief of a parish, in case a bastard child has been left to be a charge upon it, and for the further maintenance of a child so left: But it does by no means follow, that the putative father may not maintain it himself. It ought rather to be inferred that he may; for, by so doing, the mischief intended to be remedied, namely, the child's being left to be a charge upon the parish, would be prevented. In *Sherman's case*, 1 *Vent.* 210. it is said by *Twissden J.* that an order for the putative father of a bastard child to allow a certain sum *per week* for the maintenance of the child, until it shall be able to get its living by working, is bad; for, perhaps, the father would take it away and maintain it himself, which he may do if he please. It is not proper, that a parish should in all cases have the care of a bastard child

child born therein; for the father, who may be a man of fortune, would, perhaps, take much better care of it.

Foster J. doubted, as to the right of the putative father of a bastard child to maintain it himself, and added, that in his opinion, there would be danger of bastard childrens dying for want of care, or of their being murdered, if all the putative fathers of such children could take them from the officers of the parishes wherein they are born, and carry them where they please.

The case was ordered to stand for consideration.

At another day judgment was given for the defendant; the opinion of the court being; that the plea, which contains a sufficient excuse for non-performance of the condition of the bond, is good; and that the replication is bad, because it does neither confess, nor avoid, the matter pleaded in excuse.

Davison *vers.* Davison.

UPON a rule to shew cause, why an attachment should not be awarded for non-payment of costs, it appeared; that the demand of the costs was made by the person known to be the acting attorney in the cause; that this person not being an attorney of this court, the name of another person, who is an attorney of this court, and in whose name the cause was commenced and carried on, is upon the record; and that the acting attorney had not a letter of attorney from the attorney upon the record, empowering him to receive the costs.

A payment of costs to the acting attorney is good, although he act in the name of another attorney.

The

The rule was made absolute.

And by the court—As the person, by whom the costs were demanded, was known to be the acting attorney in the cause, payment to him would have been a good payment, although he be not the attorney upon record; for it is by the 2 G. 2 c. 23. par. 10. provided; that an attorney of any of the superior courts may commence and carry on, or defend, an action in any other of the superior courts, in the name of an attorney of the court in which the action is commenced.

Rex *vers.* Newland.

Several matters cannot be pleaded in an information in the nature of a *quo warranto*.

UPON a rule to shew cause, why the defendant should not have leave to plead several matters in an information in the nature of a *quo warranto*, the question was, Whether the 4 Ann. c. 16. do extend to such an information?

It was holden that it does not.

And by the court—There is no instance of the courts having given leave to plead several matters in an information in the nature of a *quo warranto*.

Callaghan *vers.* Pennell.

Non assumpsit infra sex annos is a special plea.

UPON a rule to shew cause, why the judgment should not be set aside for irregularity, it appeared; that the action was an action of *assumpsit*; that *non assumpsit infra sex annos* was pleaded; and that the issue was not made up by the clerk of the papers.

The

The rule was made absolute.

And by the court—In the case of *Howell v. Clark*, Hil. 13 G. 2. in this court, and in the case of the *Bank of England v. Wait*, Trin. 16 G. 2. likewise in this court, it was holden; that *non assumpsit infra sex annos* is a special plea, and no case has been cited, wherein the contrary has been holden. Wherever a special plea is pleaded, the issue, by the settled practice of this court, must be made up by the clerk of the papers.

Nisbett *vers.* Griffith.

UPON a rule to shew cause, why the plaintiff should not have leave to amend his declaration, it appeared; that the amendment intended was to add a new count after two terms.

A declaration cannot be amended by adding a new count after two terms.

The rule was discharged.

And by the court—It has been said; that in the case of *The Executors of the Dutchess of Marlborough v. Widmore*, Trin. 4 G. 2. in this court, leave was given to amend by adding a new count after two terms: But no other case has been cited, wherein such an amendment has been permitted, and it was in that case permitted upon very particular circumstances; namely, that the defendant had pleaded the statute of limitations; and that, if the court did not give leave to amend, the right of action would be lost, the plaintiffs not being in time to bring a new action.

Rex *vers.* Smith.

It is not necessary to set out the length and breadth of a nuisance in an indictment.

UPON a rule to shew cause, why judgment should not be arrested, it appeared; that the defendant had been found guilty upon an indictment for a nuisance, in laying soil in a highway, between a place called *A.* and a house called *B.* in the parish of *St. Mary Ottery*.

The question was, Whether the indictment is bad for want of the length and breadth of the nuisance being set out?

After taking time to consider, it was holden that the indictment is not bad.

And by *Lee Ch. J.*—It has been said; that although neither the length nor breadth of the nuisance is traversable, both ought to be set out in an indictment for a nuisance, in order to guide the discretion of the court in setting a fine: But it is not necessary on that account; regard not being had by the court, in setting a fine, to the length and breadth of the nuisance set out, but to the length and breadth proved. Of both these the judge, before whom the indictment was tried, must always be sufficiently informed for giving judgment, and if judgment is not to be given by him, but by another court, that court will always be sufficiently informed of both by his report.

Hewitt

Hewitt *vers.* Penny.

UPON a rule to shew cause, why an award should not be set aside, it appeared; that the arbitrators, instead of choosing an umpire, which in case of their not agreeing they were empowered to do, had tossed up who should name one; and that the award was made by the person named in consequence of the tossing up.

An award set aside, because the Umpire was named in consequence of tossing up.

The rule was made absolute.

And by the court—In the case of *Harris v. Mitchell*, 2 *Vern.* 486. an award made by an Umpire was set aside; because the two arbitrators had thrown up cross or pyle who should name the Umpire.

Kennedy *vers.* Kennedy.

UPON a rule to shew cause, why the trial should not be put off, it appeared; that the action was brought by an administrator; and that a suit was depending in a spiritual court for revoking his letters of administration.

Letters of administration may be acted under until they are revoked

The rule was discharged.

And by the court—The plaintiff has a right to act under the letters of administration, until they are revoked. There is no necessity to put off the trial in this case; for if the plaintiff should proceed to execution, and the letters of administration should be

afterwards revoked, an *audita Querela* would, agreeably to what is laid down in the case of *Turner v. Davies*, 2 *Saund.* 150. lie for the defendant.

Lawrence *vers.* Boswell.

A verdict for the finding of which the jurors voted ought not to be set aside.

UPON a rule to shew cause, why a new trial should not be had, it appeared; that the jurors, not agreeing as to the finding of a verdict, voted for one; that the votes of seven of them were for finding it as it is found; and that no objection was made by the other five when the verdict was given.

The rule was discharged.

And by the court—Nothing was in this case determined by chance. The five jurors might ultimately be convinced by the seven: But if they only acquiesced in the finding of the verdict, that is sufficient; and they shall not now be received to say, that they did not acquiesce.

Rex *vers.* The Inhabitants of Tardebigg.

Marriage during a service does not prevent the gaining of a settlement.

IN an order of sessions it was stated; that the *Pauper* was hired as a servant, from *Michaelmas* day in one year to *Michaelmas* day in the next year, in the parish of *Tardebigg*; that he came three days after the former *Michaelmas*, and stayed one day after the latter; that he was absent, during the year, at different times about fourteen days, for which six shillings were deducted out of his wages; that he was afterwards hired for a year in *Hanbury*; that after serving three quarters of this year he married a woman who

was

was with child ; that complaint was made of this by his master to a justice of peace, who made no order for the discharge of the *Pauper* ; and that soon after the *Pauper* was discharged by his master, and a deduction was made out of his wages for the remainder of the year ; that the discharge and deduction were against the consent of the *Pauper* ; and that he offered to serve the remainder of the year.

One question was, Whether the *Pauper* gained a settlement in *Tardebigge* ?

It was holden that he did.

And by the court—The absences of the *Pauper* in the beginning of the year, and during the service, were cured by the master's receiving him again ; and the deduction of wages did not prevent his gaining a settlement.

Another question was, Whether the *Pauper* gained a subsequent settlement in *Hanbury* ?

It was holden that he did.

And by the court—Marriage is not in itself a dissolution of a contract for service. It has been holden, that marriage is not a good cause for discharging an apprentice : For that the remedy is by an action upon the covenant. It is very doubtful, whether, as the power given to a justice of the peace by the 5 *Eliz. c. 4, par. 5.* of discharging a servant, is only given for reasonable cause, marriage is a reasonable cause of discharge : But if it be, as the justice of the peace made no order for the discharge of the *Pauper*, the discharge by his master was illegal. The offer of the *Pauper* to serve the remainder of the year ought to be deemed

deemed a continuation of the service; and if the service continued, the deduction of wages, especially as it was against the consent of the *Pauper*, did not prevent his gaining a settlement.

Rex *vers.* Blunt.

A new trial cannot be had after an acquittal upon an information in the nature of a *Quo Warranto*.

UPON a motion for a new trial, it appeared; that the defendant had been acquitted upon an information in the nature of a *Quo Warranto*.

The court refused to make a rule to shew cause.

And by the court—In the case of *Rex v. Bennett, Trin. 4 G. 1.* which was argued before all the judges, a new trial was not granted after an acquittal upon such an information; the judges being equally divided in opinion upon the question, whether a new trial can be granted after an acquittal upon an information in the nature of a *Quo Warranto*? In the case of *Rex v. Jones, Trin. 12 G. 1.* wherein the same question arose; a new trial was not granted, the court being equally divided in opinion upon the question.

Anonymous.

The first weekly payment to a prisoner has a retrospect to the day of notice

UPON a motion, for discharging the defendant out of prison, it appeared; that notice had been given to the defendant, upon the 31st day of *March*, that the plaintiff would pay him two shillings and four pence *per week*; that upon the 4th day of *April*,
two

two shillings and four pence were paid to him, and upon the 14th day of *April* two shillings and four pence.

A rule was made for discharging the defendant.

And by the court—The first weekly payment to a prisoner has always a retrospect to the day of notice; and as the weekly payments to a prisoner are to be made upon the first day of every week, the prisoner must be discharged; because the second weekly payment was not upon the seventh day of *April*.

Rex *versf.* Swimmer.



UPON a rule to shew cause, why an information should not be filed against the defendant, it appeared; that the defendant was a parish officer; and that he had bound three poor children to serve as apprentices in foreign parts, and had sent them thither.

Binding a poor child to serve as an apprentice in foreign parts is unlawful.

The court shewed an inclination to make the rule absolute; the offence being deemed kidnapping: But upon an undertaking of the defendant, to have the children back by a certain time, it was discharged.

Jennings *qui tam versf.* Wilson and two others.

UPON a rule to shew cause, why there should not be judgment as in the case of a *Nonfuit*, it appeared; that one of the defendants had not appeared; and that the two who had appeared and pleaded both joined in the application.

Judgment as in the case of a *nonfuit*, ought not to be given, unless all the defendants apply for it.

The rule was discharged.

And

And by the court—It has been said; that this case differs from the case of (D) *Watson qui tam v. Jackson and others*. Hil. 25 G. 2. in as much as one of the defendants, who had appeared and pleaded, did not in that case join in the application: But there is no reason for the court to depart, on account of this difference, from what was then holden; for the ground of the opinion of the court in that case was, that unless all the defendants in an action apply for judgment as in the case of a *Nonfuit*, the court ought not to give such judgment. It has been said; that if judgment as in the case of a *Nonfuit* cannot be obtained, because one of the defendants in an action has not appeared, a vexatious plaintiff may always make some friend a defendant, upon whom he can prevail not to appear, in order to prevent the obtaining of such judgment by the defendants who have appeared: But this argument does not hold stronger in the present case, than it would have done in the case of *Watson qui tam v. Jackson and others*; it being just as easy, for a vexatious plaintiff to make some friend a defendant, upon whom, if he do appear, he can prevail not to apply for judgment as in the case of a *Nonfuit*, as it is to make some friend a defendant, upon whom he can prevail not to appear.

(D) Ante page 22.

Michaelmas

Michaelmas Term,

27 Geo. 2. 1753.

Sir William Lee, *Chief Justice.*

Sir Martin Wright, }
Sir Thomas Denison, } *Justices.*
Sir Michael Foster, }

Rex *vers.* The Corporation of Scarborough.

UPON a motion for a *Mandamus* to the corporation of *Scarborough*, for proceeding to the election of certain officers, it appeared; that such a *Mandamus*, as was now moved for, had been awarded two days before upon the application of another person.

The court refused to award a second *Mandamus*.

And by the court—It has been suggested as a ground for the present motion; that the person who applied for the former *Mandamus* will suppress it: But as it is not to be presumed, that any person will dare to suppress a writ of this court, it is improper to award a second *Mandamus*.

A second *Mandamus* for electing corporation officers ought not to be awarded, upon a presumption that the first will be suppressed.

P

Rex

Rex *vers.* The Corporation of Haslemere,

If there be delay in obeying a *Mandamus* for electing corporation officers, a second *Mandamus* ought to be awarded.

UPON a motion for a *Mandamus* to the corporation of *Haslemere*, for proceeding to the election of certain officers, it appeared; that such a *Mandamus*, as was now moved for, had been already awarded upon the application of another person.

The court refused to award a second *Mandamus*: But a time for proceeding to the election was ordered to be inserted in the former *Mandamus*.

A rule was likewise made, whereby it was ordered; that the notice of the election should be given by the under-sheriff.

At another day, it appearing, that the time for proceeding to the election was passed, and that no notice of the election had been given by the under-sheriff, a second *Mandamus* was awarded.

And by the court—If it had appeared upon the motion for a second *Mandamus*; that there was good ground to suspect delay in proceeding under the first, the court would then have awarded a second. It does now appear, that there has been delay in proceeding under the first, and consequently it is now proper, that a second *Mandamus* should be awarded.

Methuen

Methuen *vers.* Martin.

UPON a rule to shew cause, why a sum of money paid by the defendant, should not be repaid with costs, it appeared; that the defendant was a private man in one of the troops of life guards; and that, being arrested for a debt under ten pounds, he paid the debt in order to obtain his liberty.

A private man in one of the troops of life guards is not liable to be arrested for a debt under ten pounds.

One question was, Whether the defendant be such a soldier, as is by 26 G. 2. c. 5. exempted from being liable to an arrest for a debt under ten pounds?

Wright J. *Denison J.* (*Lee Ch. J.* being absent) were of opinion that he is.

And by *Wright J.* it is declared by that statute, "that no person, who shall be lifted, or shall lift himself as a volunteer in his Majesty's service as a soldier, shall be liable to be taken out of his Majesty's service by any process, other than for some criminal matter, unless for a real debt of ten pounds."

Foster J. inclined to be of opinion, that as a person, instead of receiving money, pays a considerable sum upon being admitted as a private man into a troop of life guards, such person is not a soldier within the meaning of that statute.

At another day, a certificate being produced from the commissary general's office, that the defendant did lift himself as a volunteer; and it appearing, that soon after he lifted himself, the articles of war were read over to him; and that the oath directed to be administered

nistered to a soldier by a justice of the peace was taken by him, *Foster* J. concurred in opinion with the other justices.

Another question was, Whether, although the defendant would, while under the arrest, have been entitled to the discharge of his person, he be now entitled to have the money paid to obtain his liberty repaid?

It was holden that he is.

And by the court—It is equally reasonable, that the money paid by the defendant to obtain his liberty should be repaid, as that his person, in case the application had been on that account, should have been discharged.

Rex vers. Boys.

An indictment lies for not paying the costs ordered to be paid upon discharging an appeal to a Poor's rate.

UPON a rule to shew cause, why an indictment should not be quashed, it appeared; that the indictment was for disobedience to an order of sessions, whereby costs were ordered to be paid by the defendant upon the dismissal of an appeal to a Poor's rate.

The rule was discharged.

And by the court—It is in the general true, that disobedience to an order of sessions is an indictable offence.

It has been said; that as the justices of a court of quarter sessions are only empowered by the 17 G. 2. c. 38. to order costs to be paid upon an appeal to a Poor's rate, in the same manner as they are by the 8 & 9 W. 3. c. 30. empowered to do upon an appeal to an order of removal, an indictment does not lie, for
not

not paying the costs ordered to be paid upon an appeal to a Poor's rate; another remedy by distress being given by the 8 & 9 W. 3. for the costs ordered to be paid upon an appeal to an order of removal: But this objection is not well founded; for the remedy by distress is only given, where the person ordered to pay the costs lives out of the jurisdiction of the court.

Archer vers. Ellard.

UPON a rule to shew cause, why the defendant should not be discharged on filing common bail, it appeared; that the affidavit for holding to special bail was, that the defendant is indebted to the plaintiff upon a bond in the penalty of one hundred pounds; and that the bond was a bond for performance of covenants.

An affidavit that money is due upon the penalty of a bond, is not sufficient for holding to special bail.

The rule was made absolute.

And by the court—This affidavit is insufficient, for want of shewing some particular breach or breaches of covenant, on account of which the sum of ten pounds is due to the plaintiff. In the case of *Booker v. Friend*, Trin. 24 & 25 G. 2. in this court, an affidavit, that the defendant was indebted to the plaintiff in the sum of twenty pounds, upon breach of articles, was holden to be insufficient for holding to special bail; because no particular breach of the articles was shewn. If an action be brought upon a bond for the payment of money, it is not enough, that the affidavit for holding to special bail shew the penalty of the bond: But it must likewise shew,

shew, that the sum of ten pounds is due upon the bond for principal and interest.

Wigan *vers.* Holmes.

Judgment, as in the case of a *Nonsuit*, may be given where the return to a *Mandamus* is traversed.

UPON a motion for judgment as in the case of a *Nonsuit*, it appeared; that a material fact contained in a return to a *Mandamus* was traversed; and that issue was joined upon the traverse.

Wright J. (*Lee Ch. J.* being absent) at first had some doubt, whether the statute, by which the court is empowered to give judgment, as in the case of a *Nonsuit* "in any action between party and party," does extend to a traverse of a return to a *Mandamus*?

But it was observed by *Denison J.* that it is by the 9 *Ann. c. 20.* declared; that if any material fact contained in a return to a *mandamus* shall be traversed, such further proceedings shall be had thereupon, as if an action had been brought for a false return.

A rule was made to shew cause, which no cause being shewn, was afterwards made absolute.

Rex *vers.* Harrison.

If the facts, upon which a rule to shew cause is made, are expressly denied, the practice is to discharge the rule.

UPON a rule to shew cause, why an attachment should not be awarded, it appeared; that every fact, charged in the affidavit upon which the rule was made, was particularly and expressly denied in the affidavit upon which cause was shewn.

The rule was discharged.

And

And by the court—If all the facts, charged in the affidavit upon which a rule to shew cause is made, are positively and so expressly denied in the affidavit upon which cause is shewn, that if the denial be false, an indictment will lie for perjury, it is the course of the court to discharge the rule, and leave the party, upon whose application it was obtained, to prosecute for perjury.

Anonymous.

UPON a motion that the defendant might be discharged out of prison, it appeared; that an action *qui tam* had been brought against the defendant for the penalty of one hundred pounds, given by the 6 & 7 W. 3. c. 6. for having married two persons without a licence, or without the publication of bans; that he had been committed for want of appearing, and had lain in prison four months; and that there had been no further proceeding in the action.

A *Superfedeas* awarded, because there had been no proceeding against a defendant in prison within four months.

A rule was made, that, upon an appearance being entered for the defendant, a *Superfedeas* should be awarded.

And by the court—As there has been no proceeding against the defendant within four months, he is, upon an appearance being entered, entitled to a *Superfedeas*.

Rex

Rex *vers.* Lediard.

An information for a libel, on account of what was contained in an affidavit, refused.

UPON a motion, for leave to file an information for a libel, it appeared; that, after a person had been committed to prison under the warrant of a justice of the peace, the defendant, another justice of the peace, granted a warrant of *Superfedeas*; and that complaint being made of this to the Lord Chancellor, the defendant exhibited an affidavit in excuse of himself. The ground of the present motion was; that divers matters contained in this affidavit were impertinent, and amounted to a libel upon the justice by whom the person was committed.

The court refused to make a rule to shew cause.

And by the court—There is no instance of this court giving leave to file an information in a case like the present. It is not usual for any court to examine minutely all the matters contained in such an affidavit: But if it were proper to do this, and to give redress in the present case, the application for it ought to be to the court wherein the affidavit was exhibited, and not to this court.

Hilary

Hilary Term,

27 Geo. 2. 1754.

Sir William Lee, *Chief Justice.*

Sir Martin Wright,
Sir Thomas Denison, } *Justices.*
Sir Michael Foster,

Schomberg *vers.* Nash.

IN an action of debt, the plaintiff declared upon an agreement entered into by the defendant, a coachmaker; by which he was, on the penalty of one hundred pounds, to find a chariot for the plaintiff, and keep it in repair for the term of five years; and the breach assigned was, that the chariot found by the defendant did, during the term of five years, break down for want of being kept in repair.

If a coach-maker has agreed to keep a carriage in repair, he is bound to take notice when it wants repair.

The defendant pleaded; that he did at all times, since the agreement was entered into, repair the chariot when notice was given to him that it wanted repair; and that he is

Q ready

ready to repair it during the residue of the term of five years, whenever notice shall be given to him that it wants repair.

Upon a demurrer to this plea, the question was, Whether it was incumbent upon the plaintiff, when the chariot wanted repair, to give notice thereof to the defendant?

It was holden that it was not.

And by the court—The defendant, being coachmaker, was a much better judge when the chariot wanted repair than the plaintiff: But if this were not so; as the defendant was bound by the agreement to keep the chariot in repair, it was his duty to take notice, from time to time, what repair it wanted, and to take care that it was in repair.

Rex vers. Kendrick.

If contemptuous words are spoken of the court, an attachment is to be awarded in the first instance.

UPON a motion for an attachment, it appeared; that the defendant, upon being served with process, had spoken contemptuous words of the court.

An attachment was awarded.

And by the court—The distinction is, that where contemptuous words are spoken of the court, an attachment is to be awarded in the first instance: But where the words are spoken of the process of the court, there is to be a rule to shew cause.

Hawkins

Hawkins *vers.* Easterbrooke.

IN a case reserved, in an action of debt upon a bond, it was stated; that the penalty of the bond was twenty pounds; that the condition of the bond was, that *John Easterbrooke*, son of the defendant, should serve the plaintiff as an apprentice four years, and not absent himself during that term from the service of the plaintiff, without leave; that the plaintiff alledged in his declaration, that *John Easterbrooke* did on a certain day during the term, absent himself from the service of the plaintiff without leave, and continued absent to the end of the term; that the defendant pleaded, that *John Easterbrooke* did not absent himself from the service of the plaintiff; that issue was joined upon this plea, that at the trial of the issue it was proved, that *John Easterbrooke* did absent himself from the service of the plaintiff during the term, and that another person was hired, during his absence, to do the business which he ought to have done; and that it was likewise proved, that *John Easterbrooke*, after having been some time absent, returned to the plaintiff, and was received and employed by him.

An action lies upon a covenant, that an apprentice shall not absent himself from his master's service, although his master receive him after having absented himself

The question was, Whether the action could be maintained?

It was holden that it might.

And by *Wright J.* (*Lee Ch. J.* being absent) it has been said, and very truly; that the receiving of a servant, after having absented himself, does so far purge the absence, that it shall not prevent his gaining a settlement; and, perhaps, the absence in the present case

was so far purged by the subsequent reception of the apprentice, that it would not have been a cause of discharging him: But if this were so, it would by no means follow, that the present action does not lie.

And by *Denison J.* If an action of covenant be brought, upon a covenant that an apprentice shall not absent himself from his master's service, the receiving of the apprentice after having absented himself ought to go in mitigation of damages: But if a penalty be agreed upon, in case an apprentice shall absent himself from his master's service, an action of debt lies for the penalty upon any absence. It was not necessary for the plaintiff to alledge a continuance of the absence; in as much as, his right to recover the penalty was not waved by the reception and employing of the apprentice, after he absented himself.

And by *Foster J.* the single question is, Whether *John Easterbrooke* was absent to the prejudice of the plaintiff: Which he certainly was; for it is stated, that another person was hired during his absence to do the business which he ought to have done. The opinion, that the receiving of a servant, after absenting himself from his master's service, does so far purge the absence that a settlement may be gained, is founded upon a supposition, that the relation of master and servant continued during the absence.

Saxby vers. Kirkus.

The issuing of process, under which a person has been arrested, may be traversed.

IN an action of debt upon a bail bond, the plaintiff alledged in his declaration; that a certain bill of *Middlesex* issued against *J. S.* that *J. S.* was arrested thereupon; and that the defendant entered into the bail bond.

The

The defendant pleaded that such a bill of *Middlesex* did not issue.

Upon a demurrer to this plea, it was holden to be good.

And by *Wright J.* (*Lee Ch. J.* being absent.) At the common law the sheriff could not take a bail bond, and the 23 *H. 6. c. 10.* by which he is empowered to do it, does only empower him, when the defendant is in custody by virtue of a legal process.

It has been said; that in the case of *Watkins v. Parry*, *Trin. 7 G. 1.* it was holden upon a demurrer, that the arrest is not traversable in an action upon a bail bond, and it was with good reason so holden; for the consequence, if the arrest were traversable in such action, would be, that a bail bond would never be good, unless the party, against whom a process had been issued, were exposed by an actual arrest: But it by no means follows, that the issuing of the process is not traversable. In the present case, the defendant had an undoubted right to traverse the issuing of the bill of *Middlesex*; for if such a bill did not issue, the bail bond is *ipso facto* void, and consequently the plaintiff has no ground of action.

After this opinion was delivered, a motion was made for leave to withdraw the demurrer and amend.

The court refused to make a rule to shew cause.

And by *Wright J.* it is not usual to give leave to amend, after a demurrer has been argued, and the opinion of the court is known; and it is certainly improper to give leave in the present

present case, it being an action against bail, whom the court is always inclined to favour.

Rex vers. The Churchwarden's and Overseers of St. Helens, Abingdon.

The names of the persons intended to be rated, ought to be mentioned in the notice of appeal to a Poor's rate.

UPON a rule to shew cause, why a Poor's rate should not be quashed, it appeared; that a court of quarter sessions, upon hearing the appeal of *Spinage and others*, who complained of being aggrieved by divers persons being left out of a Poor's rate and otherways, had ordered the rate to be amended, by inserting the names of sixteen persons, and by striking out the name of one person.

The rule was made absolute.

And by *Wright J.* (*Lee Ch. J.* being absent) it has been objected; that the names of the persons intended to be rated were not mentioned in the notice of appeal; and we are of opinion, that this objection is well founded. It is doubtful, whether the court had a power to insert the name of any persons in the rate, unless the names of the persons intended to be rated were mentioned in the notice of appeal; for the power of amending a Poor's rate, which is given to a court of quarter sessions by the 17 G. 2. c. 38. is confined to the amending it in such manner only as shall be necessary in giving relief. There is another reason, why the names of the persons, intended to be rated, ought to be mentioned in the notice of appeal to a Poor's rate; namely, that the parish officers, to whom notice of the appeal is to be given, may come prepared, to shew why those persons were not rated.

It

It has been objected ; that the court had not a jurisdiction to strike the name of any person out of the rate ; it being no part of the complaint, that any person was rated who ought not to be rated : And we are inclined to be of opinion that the court had not. But if it should be admitted, that under the word *otherwise* in the complaint the court had a jurisdiction as to this, we are of opinion, that the name of the person intended to be stricken out of the rate ought to be mentioned in the notice of appeal, that the parish officers may come prepared to shew why that person was rated.

Rex *vers.* Blower.

IN an indictment for a nuisance, the defendant was alledged to be of the parish of *Shepey* ; and the nuisance was alledged to be in a highway in the parish of *Shepey*.

It is not necessary, in an indictment for a nuisance in a highway, to shew in which of two vills in a parish the highway is.

The defendant pleaded in abatement ; that there are four vills in the parish of *Shepey* ; and that it is not shewn in which of the vills the highway is.

Upon a demurrer to this plea, it was holden to be bad ; and judgment of *Respondens Ouster* was given.

And by the court—As the defendant is alledged to be of the parish of *Shepey*, it would have been a good plea in abatement, that it is not shewn of which vill he is ; for it is laid down 2 *Inst.* 669. that if there be two vills in a parish, the addition of the parish is not sufficient. But although there are two or more vills in a parish, it is not necessary, in an indictment for a nuisance in a highway in the parish, to shew in which of the vills the highway is.

Harding

Harding *vers.* Wilkin.

The proceedings in an action of *Trover* are not to be stayed upon bringing the goods into court.

A Motion was made, that upon bringing into court a gold watch and a diamond ring, for the conversion of which the action was brought, the proceedings in an action of *Trover* might be stayed.

The court refused to make a rule to shew cause.

And by *Wright J.* (*Lee Ch. J.* being absent) it has been said; that in the case of (E) *Catling v. Bowling*, *East.* 26 *G. 2.* in this court, a rule was made to shew cause, why upon bringing a book into court, for the conversion of which an action of *Trover* had been brought, the proceeding in the action should not be stayed: But the rule to shew cause in that case, which was contrary to the usual course of the court, was granted upon the very particular circumstances of the case, and the court never heard any more of that rule.

Grubb *vers.* Smithers and Collins.

The recognizance of bail is forfeited upon the return *non est inventus* to the *Capias ad Satisfaciendum*.

UPON a rule to shew cause, why the proceedings should not be stayed, it appeared; that the action was brought upon a recognizance entered into by the defendants, as bail of *J. S.* that a *Capias ad Satisfaciendum* had issued upon a judgment against *J. S.* to which the return was *non est inventus*; and that before there was any further proceeding upon the judgment, and before the present action was brought, *J. S.* died.

The rule was discharged.

(E) Ante page 80.

And

And by the court—When the proceeding against bail is by *Scire Facias* upon the recognizance, execution cannot be taken out upon the *Scire Facias*, unless the return thereto be *Scire Feci*; for if a *Nil* be returned thereto, execution cannot be taken out, unless there is a return to a second *Scire Facias*: But this is an indulgence of the court in favour of bail, that they may have so much further time to render the principal, and not a matter of right; for the recognizance, as is laid down in the case of *Widmore v. Clark and Havard*, Lord Raym. 157. is, in strictness of law, forfeited upon the return of *non est inventus* to the *Capias ad Satisfaciendum*. In the present case it would answer no purpose, except that of delay, to stay the proceedings; for, the principal being dead, there never can be a render of him in discharge of the defendants.

Anonymous.

UPON a motion for an attachment, for rescuing a person out of the hands of the sheriff, it appeared; that the sheriff had returned a *Rescous*.

An attachment was awarded.

And by the court—Whenever a *Rescous* is returned by a sheriff, an attachment is to be awarded in the first instance.

If a *Rescous* be returned by a sheriff, an attachment is to be awarded in the first instance.

Rex *vers.* Masters.

An advertisement, published by a husband concerning his wife, is not a libel.

UPON a rule to shew cause, why an information should not be filed for a libel upon *Anne Stone*, it appeared; that *Anne Stone* was a married woman; and that the defendant, who was a printer, had printed and published an advertisement, which was now complained of as a libel, at the request of her husband, in order to reclaim her.

The rule was discharged.

And by the court—A husband has a right to publish an advertisement concerning his wife; and it must be a very strong case indeed, in which this court will give leave to file an information for a libel, against the printer of the advertisement.

Easter

Easter Term,

27 Geo. 2. 1754.

Sir Dudley Ryder, *Chief Justice.*

Sir Martin Wright,
Sir Thomas Denison, } *Justices.*
Sir Michael Foster,

MEMORANDUM. Sir *Dudley Ryder* took his seat, as Chief Justice of this court, the beginning of this term, in the room of Sir *William Lee*, the late Chief Justice, who died during the vacation, after last term.

Rex vers. Berkley and Bragg.

UPON a rule to shew cause, why a *certiorari* should not issue to remove an order made by the defendants, two justices of the peace, it appeared; that the order was to empower *Taylor*, a glass bottle maker at *Bristol*, to deduct out of future duties charged upon them, a sum of money sufficient to reimburse himself another sum of money, which was

The king is not bound by the statute, which limits the time for removing an order of justices of the peace.

R 2

adjudged

adjudged by the defendants to be an overcharge in former duties charged upon him; and that the order had been made above six months.

The question was, Whether the 13 G. 2. c. 13. whereby the time for removing an order of justices of the peace by a *Certiorari* is limited to six months, extends to the king?

It was holden that it does not.

And by *Ryder Ch. J.*—As it is not to be imagined, that the king will be guilty of vexatious delays, this statute, which was professedly made to prevent vexatious delays, occasioned by the suing forth writs of *Certiorari*, for the removal of convictions, judgments, orders and other proceedings before justices of the peace, does not extend to the king. There is another reason, arising from a requisite of this statute, from whence it may be concluded, that it does not extend to the king; namely, that the party intending to sue forth a *Certiorari*, is to give notice to the justice or justices of the peace before whom the proceeding was; for it has been constantly holden, that the word party in a statute does not extend to the king.

Many cases are mentioned, *Plowd.* 243, 244. wherein it has been holden; that the king is not bound by a statute, unless he be expressly mentioned therein.

In the case of *Rex v. Farewell, East.* 17 G. 2. it was holden; that a *Certiorari* for removing an indictment for a nuisance in a highway lies for the king, although no affidavit has been made, and no recognizance has been entered into, both of which

which are required by divers statutes, when such an indictment is removed by a subject.

Ruffel's Case,

UPON a motion against *Ruffel*, an attorney, it appeared that a deed had been delivered to him by a client; and that, notwithstanding an offer had been made, of paying him what was due from the client for fees and on other accounts, he refused to redeliver the deed.

A deed that has been delivered to an attorney by a client must, on payment of what is due, be re-delivered.

A rule was made for *Ruffel* to shew cause, why, upon the payment of what was due from the client for fees and on other accounts, he should not re-deliver the deed?

And by *Ryder Ch. J.*—In *Howe's* case, *Hil. 11 G. 1.* in this court, a rule was made for *Howe*, an attorney, to re-deliver writings, for which he had given a receipt together with an undertaking to re-deliver them on demand; and that in default thereof, an attachment should be awarded against him. A court of law ought, in a case like the present, to go as far as possible against the attorney, in order to deliver the client from the necessity of applying for relief to a court of equity.

As the court heard no more of the rule in the present case, it is probable, that the terms thereof were complied with.

Tilt *vers.* Bartlet and Wife.

If an action be against husband and wife, and the wife survive the husband, she is entitled to the costs taxed under a rule of court.

UPON a rule to shew cause, why an attachment should not be awarded against the plaintiff, it appeared; that a rule, for setting aside the proceedings in this action for irregularity with costs, had been made absolute; that after the costs had been taxed, pursuant to this rule, the defendant *Bartlet* died; that a demand of the costs had, since his death, been made by the other defendant; and that the plaintiff had refused to pay them.

The question was, Whether the widow be entitled to the costs?

It was holden that she is.

And by the court—If in an action brought by husband and wife there be judgment of *Nonsuit*, the survivor is liable to costs; and *pari Ratione*, wherever costs become due in an action by or against husband and wife, the survivor ought to receive them. If damages and costs are recovered in an action brought by husband and wife, and the husband die after final judgment, the widow is entitled to the costs as well as the damages; for these must always go together; and consequently, as the executor of the husband is not entitled to the damages, he cannot be entitled to the costs. It is equally reasonable, that a woman, who survives her husband, should receive the costs due under a rule of court, as that she should receive such as are due upon a final judgment.

It

It has been said; that in a case which has been cited, wherein the Dutchess of *Hamilton* was, after the death of the Duke, obliged to pay costs due under a rule of court, the Dutchess was a party to the rule; it being a consent rule, entered into by her together with the Duke in an ejectment: But the opinion of the court was not founded upon this distinction. It was, on the contrary, expressly laid down, that there is no difference, as to the obligation upon a woman, who survives her husband, to pay costs, between such as are due under a rule of court, and such as are due upon a final judgment.

Mills and Another *vers.* Gregory.

UPON a rule to shew cause, why a prohibition should not be awarded to a suit in the court of admiralty, it appeared; that the suit was instituted by two common sailors for wages; and that the ship had not sailed out of the river *Thames* when the wages became due.

The rule was discharged.

And by the court—One of the privileges of suing for wages in the court of admiralty is, that two or more mariners may join in a suit in that court, and not be put to the inconvenience of bringing separate actions, which they must do, if they sue in a court of common law. In the case of *Wells v. Osmond*, 6 *Mod.* 238. it was holden; that a suit may be instituted in the court of admiralty, for wages which became due after a contract to go a voyage, although the voyage was put off.

Common sailors may join in a suit for wages, altho' the ship had not sailed out of the river *Thames* when the wages became due.

Rex

Rex *vers.* Burgefs.

A *Certiorari* for removing an indictment, may be awarded upon the motion of the attorney-general without any affidavit.

UPON a motion by the attorney-general for a *Certiorari* to remove an indictment, it appeared; that the indictment was for obstructing a highway leading through *Richmond Park*, and that it was found at an assize in the county of *Surry*.

Wright J. had some doubt, whether a *Certiorari* ought to be awarded in the present case, without an affidavit that a private right will come in question; such an affidavit being, in his opinion, required by the 5 *W. & M. c. 11.*

For the sake of removing this doubt an affidavit was produced, in which it was sworn, that the right of the King will come in question.

But the other three justices were of opinion, that it was not necessary to produce any affidavit.

And by them—The affidavit, required by the 5 *W. & M. c. 11.* is only required in the case of an indictment for not repairing a highway: Whereas the present indictment is for obstructing a highway. But if the present indictment were within the meaning of that statute: Yet, as the King is not therein expressly named, he is not bound thereby, and consequently the attorney-general might have moved for a *Certiorari* without producing any affidavit.

Rex *vers.* Goodall.

UPON a motion that the defendant, who was brought up by a *Habeas Corpus*, might be admitted to bail, it appeared; that the defendant was charged upon oath, with having been guilty of an offence made felony without benefit of clergy; namely, for being riotously assembled with divers others, and for beginning, when so assembled, to pull down a meeting-house; and that he was committed for this offence, by a warrant signed *Thomas Longford*, mayor.

It is not necessary, that an authority to commit should appear in a warrant of commitment.

The defendant was remanded.

And by the court——It has been said; that it does not appear in the warrant, that *Thomas Longford* was a justice of the peace, or that he had any authority to commit the defendant: But we are of opinion; that it is not necessary, that an authority to commit should appear in a warrant of commitment.

In the case of *Elderton and others*, 6 Mod. 75. it is laid down by Holt Ch. J. that it need not appear in a warrant of commitment, that the person who issued the warrant was a justice of the peace. In the case of *Rex v. Talbot*, Mich. 4 G. 2. the authority of what is laid down by Holt Ch. J. in the case of *Elderton and others*, was recognized; and the following distinction, which is, in our opinion, a very sensible one, was taken; namely, that in a conviction an authority to convict must appear; because convicting is a judicial act: But that an authority to commit need not appear in a warrant of commitment; because the issuing of such a warrant is a ministerial act.

If it be not necessary, that an authority to commit should appear in a warrant of commitment, the court will never intend a warrant of authority in the person who issued the warrant ; but, until the contrary appear, will presume that he had an authority.

Anonymous.

The relator in an information in the nature of a *Quo Warranto*, is liable to costs for not proceeding to trial pursuant to notice of trial.

A Rule to shew cause, why the relator in an information in the nature of a *Quo Warranto* should not pay costs, for not proceeding to trial pursuant to notice of trial, was made absolute.

And by the court—It is by the 9 *Ann. c.* 20. provided, that if judgment shall be given for the defendant in an information in the nature of a *Quo Warranto*, he shall recover his costs against the relator ; and it appears to be within the equity of that statute, that the relator in such information should pay costs, for not proceeding to trial pursuant to notice of trial.

Kemp *vers.* Mackrill.

The evidence upon the trial of court issues may be given separately. A forgery detected.

UPON the coming on of the trial of eleven issues, sent by the court of Chancery to be tried at the bar of this court, it was proposed by the council of one side ; that the evidence as to every issue should be gone through separately ; and the case of *The Earl of Thanet v. Sir Edward Snatchbull* was mentioned ; in which three of five issues, sent by a court of equity to be tried in a court of law, were tried in three different terms, and the other two were never tried.

The

The council of the other side made no objection to this proposal: But added; that as it will be a material question in three of the issues, whether the name *Mackrill* subscribed to three exhibits, and the dates of those exhibits, are of the hand-writing of *Mackrill*; it will be proper to examine all the witnesses which are to be examined as to the hand-writing of *Mackrill*, upon the first issue in which this question does arise; for that, otherwise, new witnesses may be adduced as to this point, which ought not to be permitted.

It was hereupon ordered by the court; that the evidence upon every issue shall be gone through separately; that each side shall give a list of the witnesses intended to be examined upon any one issue; and that all the witnesses which are to be examined as to the hand-writing of *Mackrill*, shall be examined upon the first issue, wherein the question does arise, whether the name *Mackrill* subscribed to an exhibit, and the date of the exhibit, are of the hand-writing of *Mackrill*.

And by *Denison J.*—It is very proper, that the evidence upon every issue should be gone through separately; it being absolutely necessary, that the evidence upon every issue should be distinguished in summing up to the jurors, else they will not be able to form a proper judgment; and it will be extremely difficult for my lord chief justice to do this, if the evidence upon so many issues be given promiscuously.

The material question in this cause was, Whether the name of *Mackrill* subscribed to two of three exhibits, and the date of those exhibits, are of the hand-writing of *Mackrill*?

In order to prove that they are, several witnesses, who had frequently seen *Mackrill* write, and were well acquainted with his hand-writing, said; that the name *Mackrill* subscribed to the three exhibits, and the dates thereof, are extremely like his hand-writing: But that the manner of the writing is not so easy as he used to write.

In order to prove that the name *Mackrill* subscribed to the three exhibits, and the dates thereof, are not of the hand-writing of *Mackrill*, and particularly that the dates are not, three eminent opticians, an eminent engraver, and an eminent writing-master were examined, and agreed in saying; that they had measured the dates of the three exhibits, which were in all three the same, namely, *the 28 October 1729*, in nine different manners; and that every one of the nine measurements, was begun and ended at the same points in every date; and that every one did agree so exactly, that two of the dates must have been copies of the third; it being, as they conceived, impossible for any person, either by chance or with design, to have written the three dates so exactly alike, without copying two of them from the third. They added; that upon examining the back of one of the dates, it appeared to them; that a sharp instrument had been drawn over the letters and figures, in a manner sufficient to make the marks of the letters and figures upon a paper laid under the date; and that upon the marks so made letters and figures exactly agreeing therewith might be written: But that if this were done, the pen must, in order to make the written letters agree exactly with the marks, be carried slowly over the marks; and

and consequently, that the manner of the writing would not appear so easy, as if the letters and figures had been written in the usual way of writing.

Some other circumstances of forgery were proved: But *Ryder* Ch. J. in summing up the evidence to the jurors, observed that the evidence of the witnesses who had measured the names and dates was exceedingly material; and there is no doubt, that the verdict, which was that the name *Mackrill* subscribed to three exhibits, and the dates thereof, were not of the hand-writing of *Mackrill*, was in a great measure founded thereupon.

Harding *vers.* Stafford.

UPON a rule to shew cause, why the inquisition upon a writ of enquiry should not be set aside, it appeared; that, although the defendant had an attorney, the notice of executing the writ had been given only to the defendant himself.

All notices in a cause are to be given to the attorney or agent in the cause.

The rule was made absolute.

And by the court—If there be a known attorney in a cause, all notices must be given to him or to his agent.

Rex

Rex *vers.* The Inhabitants of Whit-
church.

A settlement
may be gain-
ed by execut-
ing the annual
office of bai-
liff of a bo-
rough in a pa-
rish.

IN an order of sessions it was stated; that about thirty years before the *Pauper* went to reside in the parish of *Overton*; that he was soon after sworn into the annual office of bailiff of a borough in that parish, and served the office one whole year; that it is the duty of such bailiff to examine weights and measures, and to warn persons to serve upon juries in a court leet in the borough; that the *Pauper* did several times examine weights and measures, and did once warn persons to serve upon a jury in the court leet; that the borough does not extend to more than a fifth part of the parish; that the authority of the bailiff is confined to the borough; and that it is the practice to appoint new comers into the parish to the office of bailiff, for the sake of colt-ale.

The question was, Whether the *Pauper* gained a settlement in the parish of *Overton*?

It was holden that he did,

And by the court—It is by the 3 *W. & M. c. 11.* declared, that if any person who comes to inhabit in a parish, shall execute a publick annual office or charge in the parish one whole year, he shall gain a settlement.

It has been said; that as the *Pauper* did execute the annual office of bailiff in only a small part of the parish, he did not gain a settlement: But in the case of *Rex v. The Inhabitants of Fittleworth*, Mich. 18 G. 2. it was holden;

holden ; that a settlement may be gained by executing the annual office of tithing man of a manor in a parish a whole year, although the manor be not co-extensive with the parish ; it not being required by the statute, that the annual office should be executed all over the parish.

Trinity

Trinity Term,

27 & 28 Geo. 2. 1754.

Sir Dudley Ryder, *Chief Justice.*

Sir Martin Wright,
Sir Thomas Denison, } *Justices.*
Sir Michael Foster,

Mills *vers.* Long.

A surgeon of a ship may sue in the court of admiralty, for wages. A mariner may sue in the court of admiralty, for wages due upon a contract in writing entered into upon land.

UPON a rule to shew cause, why a prohibition should not be awarded to a suit in the court of admiralty, it appeared; that the suit was instituted by the surgeon of a ship, for wages due upon a contract in writing entered into upon land.

One question was, Whether the surgeon of a ship could sue in the court of admiralty for wages?

Ryder Ch. J. Wright J. and Denison J. were of opinion that he might.

Foster J. at first doubted: But he afterwards concurred in opinion with the other justices.

And

And by *Ryder Ch. J.*—As the surgeon of a ship is under the command of the master; and is as much obliged, if called upon by the master, to assist in navigating the ship, as the carpenter, he is to be deemed a mariner. In the case of *Hook v. Moreton*, Lord *Raym.* 398, it is said; that the court seemed to be of opinion; that a mate of a ship may sue as a mariner in the court of admiralty for wages. In *Madox's* case, 10 *Mod.* 526, it seems to have been admitted, that the surgeon of a ship may sue in the court of admiralty for wages.

Upon considering all the cases, we are of opinion; that the privilege of suing in the court of admiralty for wages, does extend to every person employed on board a ship, except the master.

Another question was, Whether a suit could be instituted in the court of admiralty by a mariner, for wages due upon a contract in writing entered into upon land.

It was holden that it might.

And by *Ryder Ch. J.*—it appears from the case of *Opy v. Addison*, 12 *Mod.* 38, that although a contract for wages, entered into by a mariner upon land, be in writing, the contract, if the writing be not under seal, is only to be considered as a parol contract, and a suit may be instituted in the court of admiralty for the wages thereupon due. But if there were heretofore any doubt as to this point, it is entirely removed by the 2 G. 2. c. 36. By *par.* 1. of that statute every mariner is required to enter into a contract in writing for his wages: But it is by *par.* 8. provided; “ that no mariner shall, by entering
T “ into

“ into such contract in writing, be deprived
 “ or hindered from using any means or me-
 “ thods for the recovery of wages, against
 “ any ship, the master or owner thereof,
 “ which he may now lawfully make use
 “ of.”

Rex vers. Bristow.

An indict-
 ment quashed
 for want of
 jurisdiction in
 the court of
 quarter sessi-
 ons.

UPON a motion to quash an indictment, found at a court of quarter sessions, it appeared; that the charge in the indictment was, that the defendant acted as bailiff of the borough of *Haflemere*, without having taken the oath of allegiance, and without having received the sacrament within the space of six months. As a ground for quashing the indictment it was said; that a court of quarter sessions has not a jurisdiction in such case.

A rule was made to shew cause; which, no cause being shewn, was afterwards made absolute.

Collins vers. Renison.

The throwing
 down of a
 ladder, upon
 which a per-
 son is stand-
 ing, is not
 justifiable.

IN the declaration, in an action of trespass, it was alledged; that the defendant overturned a ladder, upon which the plaintiff was standing, and threw the plaintiff from it upon the ground.

The defendant pleaded; that he was in possession of a certain garden; and that the plaintiff, against the will of the defendant, erected a ladder in the garden, and went up the ladder, in order to nail a board to the house of the plaintiff; that the defendant forbid the plaintiff so to do, and desired him to
 come

come down; and that upon the plaintiff's persisting in nailing the board, he gently shook the ladder, which was a low ladder, and gently overturned it, and gently threw the plaintiff from it upon the ground, thereby doing as little damage as possible to the plaintiff.

Upon a demurrer to this plea, it was holden to be bad.

And by *Ryder Ch. J.*—Such force, as was used in the present case, is not justifiable in defence of the possession of land. The overturning of the ladder could not answer the purpose of removing the plaintiff out of the garden; since it only left him upon the ground at the bottom of the ladder, instead of being upon it.

And by *Denison J.*—As only the ladder was in the present case *damage feasant*, it was no more lawful to throw this down, whilst the plaintiff was upon it, than it is to distrain a horse *damage feasant*, whilst a man is upon the horse's back, which it is not lawful to do.

Rex *vers.* Stanley and his Bail.

UPON a rule to shew cause, why the proceedings upon a *Scire Facias* should not be stayed, it appeared; that the *Scire Facias* was brought upon a recognizance entered into by Stanley and his bail, for Stanley's keeping the peace; that the recognizance was entered into in consequence of articles of peace having been exhibited by J. S. against Stanley; and that Stanley had been guilty of assaulting J. N.

A recognizance for keeping the peace is forfeited by an assault upon any person.

The rule was discharged.

T 2

And

And by *Ryder Ch. J.*—If the peace have not been broken by an assault upon the person who exhibited articles of the peace, the court will not permit a proceeding by *Scire Facias* upon a recognizance for keeping the peace, if the proceeding appear clearly to be vexatious: Yet, as such recognizance is for keeping the peace to all the king's subjects, as well as to the person who exhibited the articles, the court will not in a doubtful case stay the proceedings upon a *Scire Facias*; because the question, whether the breach of the peace by assaulting another person did amount to a forfeiture of the recognizance, may be determined upon the plea of not guilty to the *Scire Facias*.

Rex vers. Williams.

It is a good return to a *Mandamus* for electing an officer, that there has been an election.

UPON a suggestion, that no portreeve was elected for the borough of *St. Michaels* upon the charter day, a *mandamus* was awarded, directed to the steward of a court leet in the borough; whereby he was commanded to hold a court leet, and impanel and swear a jury; and to charge the jury to elect and swear some person into the office of portreeve of the said borough.

The return of the steward to this *mandamus* was; that in obedience to the command of the writ, he had holden a court leet, and impanelled and sworn a jury; and had charged the jury to elect and swear some person into the office of portreeve of the borough; that it was found by the jury that *J. S.* was duly elected and sworn into the office of portreeve of the borough upon the charter day; and that therefore no person could be elected and sworn into the office of portreeve of the borough, as by the writ was commanded,

The

The question was, Whether this return be good?

It was holden that it is.

And by *Ryder Ch. J.*—The steward has paid obedience to the writ, as far as it was in his power by his own acts to do it.

It has been said, that this return is bad; because, instead of being positive, it is argumentative: But we are of opinion, that it is sufficiently positive as to the principal fact; namely, that a person was duly elected and sworn into the office of portreeve of the borough upon the charter day. If this fact be true, there ought not to be any election. If it be not true, an action may be brought for a false return: But at present it is by no means proper for the court to award a peremptory *Mandamus*.

Wyndham *vers.* Bowen.

IN an action of debt upon a bond, the condition of which was, that the defendant should resign a living upon a request; the plaintiff declared, as administrator with the will annexed of *Catharine Wyndham*; and alleged, that the two persons appointed executors by her will were both dead.

A temporal court will always give credit to the judicial acts of a spiritual one.

Upon a demurrer to this declaration, it was holden to be good.

And by *Ryder Ch. J.*—The council for the defendant did begin to argue against the validity of this bond; but as it has been frequently holden, that a bond to resign a living upon request is valid, it was improper for the court to permit that point to be argued.

It

It has been said ; that it is not alledged in the declaration, that the surviving executor of *Catharine Wyndham* died intestate ; and that unless such executor did die intestate, the spiritual court had not a jurisdiction to grant letters of administration with the will annexed to the plaintiff: But we are of opinion ; that it was not necessary for the plaintiff to shew, that the surviving executor did die intestate. It being a settled point, that a temporal court ought always to give credit to the judicial acts of a spiritual one, this court will not in the present case presume, that the spiritual court has acted wrong in granting letters of administration to the plaintiff. It would have been sufficient, for the plaintiff to have declared as administrator with the will annexed of *Catharine Wyndham* ; and consequently the allegation, her two persons were appointed executors by her will, which was unnecessary, may be rejected as surplusage.

Rex *vers.* Wannop.

The estate of the person expelled must be shewn in an indictment for a forcible entry.

UPON a rule to shew cause, why an indictment should not be quashed, it appeared ; that the indictment was for a forcible entry ; and that the premises from which the expulsion was, were the freehold and inheritance of the lady of the manor : But it did not appear, what estate the person expelled had in the premises.

The rule was made absolute.

And by the court—It appears from the case of *Rex v. Dorny*, *Salk.* 260. and from an anonymous case, 1 *Ventr.* 89. that an indictment for a forcible entry is bad, if it do not therein

therein appear what estate the person expelled had in the premises : And it is absolutely necessary that this should appear ; otherwise it will be uncertain, whether any one of the statutes relative to forcible entries does extend to the estate from which the expulsion was. The 5 R. 2. c. 7. the 15 R. 2. c. 2. and the 8 H. 6. c. 9. do only extend to freehold estates ; and the 21 J. 1. c. 15. does only extend to estates holden by tenants for years, tenants by copy of court roll, and tenants by elegit, statute merchant and statute staple.

Rex vers. Boys.

UPON a demurrer to an indictment, for refusing to pay the costs awarded by an order of sessions upon the dismissal of an appeal to a poor's rate, it was objected ; that the charge in the indictment is not positive, but by way of recital : It being in this manner ; whereas the Reverend J. S. did appeal, &c. this court doth dismiss the appeal as being frivolous, and doth award twenty shillings costs, to be paid by the Reverend J. S. to the overseers of the poor of the parish of *Redburn*.

An indictment lies for not paying the costs awarded by an order of sessions.

This objection was over-ruled.

And by the court—It was necessary to set out the order of sessions in the indictment, and it was proper to set it out as it is done in the words of the order : But this is only matter of inducement ; for the offence charged in this indictment is, that the defendant refused to pay the costs awarded, and it is charged positively that he did refuse.

Another

Another objection was; that as the 17 G. 2. c. 38. by which power is given to a court of quarter sessions of awarding costs upon dismissing an appeal to a poor's rate, does only empower that court to award costs, in the same manner as it is empowered by the 8 & 9 W. 3. c. 30. to do, upon discharging an appeal concerning the settlement of a poor person, an indictment will not lie in the present case: Inasmuch as the remedy given by the 8 & 9 W. 3. c. 30. is in the first place a distress and sale of the goods distrained; and if the person who refuses to pay the costs have no goods, he may be committed to prison for the space of twenty days.

This objection was over-ruled.

And by the court—The remedies given by the 8 & 9 W. 3. are only given where the person, who refuses to pay the costs, lives out of the jurisdiction of the court by which they are awarded; and consequently an indictment, which is the general method of proceeding against a person guilty of disobedience to an order of sessions, will lie.

Rex vers. The Justices of the Court of Quarter Sessions of the County of Surry.

The court will not make a rule for the inspecting of books, until a return is made to a *Mandamus*.

A Rule having been obtained for the defendants to shew cause, why a *Mandamus* should not be awarded, directed to the justices of the court of quarter sessions of the county of *Surry*, for admitting the prosecutor to the office of clerk of the peace of that county, the court was moved on the behalf of

of the prosecutor, for a rule to inspect and take copies of the books and records in the custody of the person who officiated as clerk of the peace of that county.

No rule was made.

And by the court—If a rule be made to shew cause why an information should not be filed, the court will make a rule for the prosecutor to inspect and take copies of books and records, as soon as the rule to shew cause is made: But if a rule be made to shew cause why a *mandamus* should not be awarded, the court will not make a rule for the prosecutor to inspect and take copies of books and records, until the rule is made absolute, and a return is made to the *mandamus*.

Rex vers. Williams.

UPON a motion, for leave to file an information against a goaler, it appeared; that the goaler had suffered a person, committed upon an attachment for non-payment of costs, to go at large.

An information against a goaler, for suffering a prisoner to go at large, refused.

A rule to shew cause was refused.

And by the court—The ordinary remedy, by an action for the escape, is in this case sufficient.

Rex *vers.* Driffield.

An indictment will not lie for a breach of contract.

UPON a rule to shew cause, why the indictment should not be quashed, it appeared; that the indictment was for a cheat, in delivering a quantity of coals as and for two bushels; whereas the quantity of coals delivered was, in fact, no more than one bushel and three pecks.

The rule was made absolute.

And by the court—As there was not in this case any false token, it is nothing more than a breach of contract, and consequently an indictment will not lie.

Rex *vers.* Barton.

The *Venue* cannot be changed in an information for a false return to a *Mandamus*.

UPON a rule to shew cause, why the *Venue* in an information should not be changed, from the county of the town of *Nottingham* to the county of *Nottingham*, or to any other county, it appeared; that the information was for a false return to a *mandamus*; that the matter in issue was, whether there ought to be a common council consisting of twenty-four persons in the corporation of *Nottingham*; and that there are not in the county of the town of *Nottingham* a sufficient number of freeholders for composing a jury, who are not burgesses of the corporation.

The rule was discharged.

And

And by the court—The case of *The Mayor of Orford*, *Salk.* 669. has been mentioned; in which it is said; that the court inclined to change the *venue*, in an action upon the case for a false return to a *mandamus*: But that case, it being a civil action, would not, even if the *venue* had been changed, have been an authority in the present case.

It has been said; that as the information is, in the present case, to try the truth of a return to a *mandamus*, it is in the nature of a civil action: But no case has been cited; wherein the *venue* has been changed in an information.

It is seldom necessary, that the persons who serve upon juries in cities, boroughs and towns corporate should be freeholders; and it does not appear, that only such persons as are freeholders can serve upon juries in the town of *Nottingham*.

Rex *vers.* Botwright.

UPON a motion to quash an indictment, it appeared; that the indictment was for exposing to sale the flesh of a bull, which the defendant had killed without having first baited it, as and for steer beef.

An indictment will not lie for selling bull beef, as and for steer beef.

A rule was made to shew cause; which, no cause being shewn, was afterwards made absolute.

Rex *vers.* The Justices of the County of
Middlesex.

Only such places in a parish, as are townships or vills, are entitled to have separate overseers of the poor.

UPON a rule to shew cause, why a *mandamus* should not be awarded, directed to the justices of the peace of the county of *Middlesex*, for appointing overseers of the poor for *Kentish Town*, it appeared; that *Kentish Town* is the north division of the parish of *St. Pancras*.

The rule was discharged.

And by *Ryder Ch. J.*—It has been long settled; that the power given by the 13 & 14 *Ch. 2. c. 12.* of appointing separate overseers of the poor for a *Township* or *Vill* in a parish, may be exercised in other counties, as well as in those which are mentioned in that statute: But it does not appear, that *Kentish-Town* is either a *Township* or *Vill* in the parish of *St. Pancras*; and it was holden in the case of *Rex v. The Inhabitants of Welbeck*, *Mich. 14 G. 2.* that the 13 & 14 *C. 2.* does only extend to such places in parishes as are *Townships* or *Vills*.

It has been said; that the parish of *St. Pancras* is very large, and that the division of *Kentish-Town* is large and very populous: But neither the largeness nor the populousness of a division in a parish, even if it were a *Township* or *Vill*, is a reason for the inhabitants thereof to have separate overseers of the poor, unless it appear, that, by reason of the largeness of the parish, they *have not reaped*, or *cannot reap* the benefit of the 43 *Eliz. c. 2.*

For

For the right of having separate overseers of the poor for a *Township* or *Vill* in a parish, is only given by the 13 & 14 Ch. 2. where the inhabitants of the *Township* or *Vill*, by reason of the largeness of the parish, *have not reaped* or *cannot reap* the benefit of the 43 Eliz. There is not the least ground for saying, that the inhabitants of the division of *Kentish-Town*, if it were a *Township* or *Vill*, *have not reaped*, or *cannot reap* the benefit of the 43 Eliz. It does on the contrary appear; that from the time of making that statute to the present time, they *have constantly reaped* the benefit thereof.

Wilmot *vers.* Butler and Wife.

UPON a rule to shew cause, why the wife should not be discharged out of custody, it appeared; that she was in custody under a *Capias ad Satisfaciendum*, which issued upon the judgment in this action.

The rule was discharged.

And by the court—In the case of *Pitts v. Miller and Wife*, Trin. 15 G. 2. in this court, it was holden; that if a wife be in custody upon mesne process, which issued in an action against her and her husband, she is entitled to a discharge: But that if she be in custody under a *Capias ad Satisfaciendum*, which issued upon the judgment in an action against her and her husband, she is not entitled to a discharge; unless it appear, that her being in custody is the consequence of some fraud or collusion betwixt the plaintiff and her husband; for that execution must always follow the judgment. In the case of *Pitts v. Miller and Wife*, the case of *Jackson v. Gabree and Wife*, 1 Ventr. 51. which has been cited and

A wife may be taken in execution, upon a judgment against her and her husband.

relied

relied on in the present case, was cited and relied on: But the authority thereof was denied by the court. In the case of *Finch and wife v. Duddin and wife*, Mich. 19 G. 2. in this court; and wherein the defendant's wife, being in custody, under a *Capias ad Satisfaciendum* which issued upon the judgment, a motion was made that she might be discharged: But as it appeared; that endeavours had been used to take the husband as well as the wife, the court refused to make a rule for her discharge.

Savery *vers.* Serle.

An amendment of the declaration after two terms, the consequence of which was changing the *Venue*.

UPON a rule to shew cause, why the plaintiff should not have leave to amend his declaration, by striking out the word *Middlesex*, and inserting the word *Devonshire*, it appeared; that the declaration was of *Hilary* term last; that the defendant had pleaded; and that the consequence of the amendment would be changing the *Venue* from *Middlesex* to *Devonshire*.

Ryder Ch. J. *Wright* J. and *Foster* J. being of opinion, that leave ought to be given to amend, the rule was made absolute.

And by *Ryder* J.—It has been long settled; that the *venue* cannot be changed in a direct way, after the defendant has pleaded: But the court has of late years frequently permitted this to be done in an oblique way by amendment.

Denison J. was of opinion; that leave ought not to be given to amend.

And

And by him—The amendment in the present case will amount to the adding of a new count, which, according to the settled practice of the court, cannot be done after two terms.

Holt on the Demise of *Simpson vers.*
Ward.

UPON a rule to shew cause, why the appearance of *Ward* the tenant should not be set aside, it appeared; that Sir *Harry Slingby*, landlord of the premises in question, had obtained the common rule to appear, and be made defendant with *Ward*, in case he should appear; that *Ward* did not appear; that Sir *Harry* did appear; that issue was joined, and the cause carried down to the assizes in order to be tried; that at the assizes an agreement was entered into, for paying off the money due upon a mortgage by instalments; that in consequence of this agreement the cause was not tried; and that after all this had passed *Ward* entered an appearance.

The tenant cannot appear to a declaration in an action of ejectment, after the time allowed for his appearance is elapsed.

Wright J. was of opinion; that the tenant may enter an appearance to a declaration in an action of ejectment, at any time before judgment is signed against the casual ejector.

Ryder Ch. J. Denison J. and Foster J. were of opinion; that although judgment be not signed against the casual ejector, the tenant is precluded from appearing to a declaration in an action of ejectment, unless he do appear before the time allowed to appear in is elapsed: The rule made upon the motion for judgment against the casual ejector being; that in case the

the tenant do not appear, within the time therein allowed for his appearance, judgment may be signed against the casual ejector.

The rule was made absolute.

Rex vers. Chatley and Another.

An indictment will not lie, for not making a new Poor's rate pursuant to an order of sessions.

UPON a rule to shew cause, why an indictment should not be quashed, it appeared; that the defendants were overseers of the poor of a parish, and that the indictment was for disobedience to an order of sessions; by which they were required to make a new Poor's rate for the parish.

The rule was made absolute.

And by the court—Although the court of quarter sessions, in case it shall be necessary, upon an appeal to a Poor's rate, to quash the whole rate, are required by the 17 G. 2. c. 38. *par.* 6. to order the Church-wardens and overseers of the poor to make a new rate, and they are thereby required to make the same: Yet an indictment will not lie for disobedience to an order of sessions for making a new rate; another remedy being given by *par.* 14. of the same statute; namely, “that if any overseer of the poor of any parish, township or place, shall neglect or refuse to obey the orders and directions of this act, or any of them, where no penalty is before provided by this act, every such overseer shall for every such offence, on oath made thereof within two calendar months before two justices of the peace, forfeit for the use of the poor of such parish, township or place, a sum not exceeding five pounds, nor less than twenty shillings, to be levied by distress “ and

“ and sale of the offender’s goods, by war-
 “ rant from such justices; which sum shall
 “ be paid to some Churchwarden or overseer
 “ of such parish, township or place, for the
 “ purposes aforesaid.”

Pilkington *vers.* Hamlin.

UPON a rule to shew cause, why the *venue* should not be changed, it appeared; that the plaintiff was an attorney of this court.

The rule was discharged.

And by the court—The case of *Bisse v. Harcourt, Carth.* 126. has been cited; wherein it was said by *Dolben J.* that he remembered a case, in which the *venue* was changed, altho’ the plaintiff was an attorney: But the opinion of the other justices in that case was; that the *venue* ought not to be changed in such case upon the common affidavit.

It is the part of the privilege of an attorney; that, if he bring an action in the court of which he is an attorney, the *venue* ought not to be changed; and the court will not deprive him of this part of his privilege, unless there is some very particular and strong reason for doing it.

The *Venue* ought not to be changed, in an action brought by an attorney in the court of which he is an attorney.

Anonymous.

A plaintiff, at whose suit a defendant has been taken in execution, may remove him into the custody of the marshall.

UPON a rule to shew cause, why the defendant should not be remanded to the custody of a sheriff, it appeared; that after the defendant was in the custody of the sheriff, under a writ of *Capias ad Satisfaciendum*, the plaintiff removed him by a *Habeas Corpus* into the custody of the marshall.

The rule was discharged.

And by the court—A plaintiff in this court, at whose suit a defendant has been taken in execution, may, if he please, remove the defendant into the custody of the marshall.

Fox *vers.* Cope.

Proceedings ought not to be set aside after the verdict, on account of a mistake in the copy of the declaration.

UPON a rule to shew cause, why the proceedings should not be set aside for irregularity, it appeared; that in the copy of the declaration delivered, there was the word *London* where the word *Middlesex* ought to have been: But it likewise appeared; that the record of *Nisi Prius* was right; that the cause had been tried; and that there was a verdict for the plaintiff.

The rule was discharged.

And by the court—As the record of *Nisi Prius* is right, it would be very improper, for the court to set aside the proceedings, in a cause after the merits have been tried, on account of a mistake in any part of the pleadings whilst they were in paper.

Anonymous.

Anonymous.

UPON a motion for a trial at bar, it appeared; that issue was not joined in the action.

A trial at bar is not to be granted before issue is joined.

The court refused to make a rule to shew cause.

And by *Ryder Ch. J.*—It is contrary to the practice of the court, to grant a trial at bar in any action before issue is joined, except in an action of ejectment; in which, as issue is very seldom joined till the term is over, it would in the general be too late to apply for a trial at bar after it is joined.

Michaelmas Term,

28 Geo. 2. 1754.

Sir Dudley Ryder, *Chief Justice.*

Sir Martin Wright,
Sir Thomas Denison,
Sir Michael Foster, } *Justices.*

Harrison, Chamberlain of the City of
London, *vers.* Alexander.

A writ of
Procedendo a-
warded, al-
though a writ
of *Superfedeas*
to a writ of
privilege was
refused.

THIS action being brought in the court
of the mayor of the city of London, the
defendant, who was an attorney of this court,
sued out a writ of *Privilege*.

The plaintiff, upon being served with this
writ, obtained a rule to shew cause, why a
writ of *Superfedeas* should not be awarded:
and why a writ of *Procedendo* should not be
awarded.

The

The court refused to award a writ of *superfedeas*. A writ of *procedendo* was awarded: But it was by the express order of the court inserted in the rule for awarding the writ of *procedendo*, that this writ is to be without prejudice to the defendant's pleading his privilege in the court below.

And by the court—If a writ of *superfedeas* should be awarded, which would be a determination of this court, that the defendant is not entitled to privilege; and the court below should, upon the defendant's pleading privilege, determine that he is entitled to privilege, or any other court upon an appeal from that court should so determine, there would be a clashing of determinations.

On the other hand, if this court should refuse to award a writ of *procedendo*, it would be a determination of this court that the defendant is entitled to privilege; and as this determination, it being upon a motion, must be final, the plaintiff would be thereby precluded, from having the opinion of any other court upon the question of privilege, which, it being a question of very extensive consequence, ought to be determined in the most solemn manner. It is however proper, to have it inserted in the rule for awarding the writ of *procedendo*, that this writ is to be without prejudice to the defendant's pleading his privilege in the court below; lest there should be an apprehension, that this court has determined any thing as to the question of privilege.

Emmerson

Emmerson and Wife *vers.* Cavendish,
Vicar General to the Bishop of
Durham.

Residing out
of the jurif-
diction of an
ecclesiastical
court, is a
good cause of
prohibition.

UPON a rule to shew cause, why a prohi-
bition should not be awarded to the
consistory court of the Bishop of *Durham*, it
appeared; that the residence of the defendant
in the cause in the consistory court was out of
the jurisdiction of that court; namely, in
Scotland.

The rule was made absolute.

Rex vers. Rollo.

An indict-
ment for piss-
ing in a room,
in which two
women were
present, ought
not to be
quashed.

UPON a rule to shew cause, why an in-
dictment should not be quashed, the
charge in the indictment appeared to be; that
the defendant did unlawfully and with force
and arms enter the dwelling-house of the pro-
secutor; and did indecently, unlawfully, in-
juriously and impudently piss upon the floor
of a certain room in the said dwelling-house,
in which the wife of the prosecutor and the
wife of J. S. were personally present; and
that the defendant had pleaded to the indict-
ment.

The rule was discharged.

And by the court—It has been said; that
this rule ought to be discharged, because the
defendant had pleaded to the indictment be-
fore the motion was made to quash it: But
this is no reason for discharging the rule; it
not being an objection to the quashing of an
indictment, that the defendant has pleaded
thereto.

It

It has been said; that an indictment will not lie for what was done by the defendant. If it were necessary for the court to give any opinion as to this, the opinion would probably be; that what the defendant did was *contra bonos mores*, and consequently that an indictment will lie: But however that may be, the present is by no means a case, in which the court ought to exercise its discretionary power of quashing an indictment.

Rex *vers.* Ashton.

UPON a rule to shew cause, why a *mandamus* should not be awarded for restoring the defendant to the office of parish clerk, it appeared; that the defendant was appointed to the office by the parson.

A *Mandamus* awarded, for restoring a person to the office of parish clerk.

The rule was made absolute.

And by *Ryder Ch. J.*—It has been said; that as the defendant was appointed to the office by the parson, his right thereto is an ecclesiastical right; and consequently, that he is not entitled to a *mandamus*, which is a temporal remedy for restoring him to the office: But as a parish clerk, whether appointed by the parson or elected by the parishioners, has a freehold in his office, he ought not to be removed therefrom without good cause; and it is by no means proper to determine upon a motion, whether the person, who has been removed from the office of parish clerk, was removed for good cause.

Denison J. inclined to be of opinion; that the right to the office of parish clerk is a temporal right.

Foster

Foster J. was clearly of opinion, that the right to the office of parish clerk is a temporal right; and he added, that a parish clerk, although he were appointed to the office by the parson, is a servant to the parishioners.

Rex vers. Fisher and Others Justices of the Peace for the County of Berks.

An absolute rule for a *mandamus* to justices of the peace to allow a poor's rate.

UPON a motion, for a *mandamus* to the defendants to allow a poor's rate, it appeared; that the rate was regularly made; and that the defendants had refused to allow it.

The court had at first some doubt, whether there ought not to be a rule to shew cause: But after a little consideration, an absolute rule was made.

And by *Ryder Ch. J.*—It is not proper to make a rule to shew cause in this case; because, while the rule is depending, the poor may suffer; no overseer of the poor being obliged to disburse money, until he has obtained a rate for collecting it.

Bowen vers. Barnett.

Special bail is not always necessary, in an action of debt upon a judgment.

UPON a rule to shew cause, why there should not be special bail in an action of debt upon judgment, it appeared; that one of the special bail in the original action had absconded; and that the other was become insolvent.

The rule was discharged.

And

And by the court—It has been frequently holden; that if there was special bail in the original action, and the plaintiff in that action bring an action of debt upon the judgment therein obtained, he is not entitled to special bail in the latter action. As there is a degree of vexation in bringing an action of debt upon a judgment, such an action ought not to be favoured.

Rex vers. Hood.

UPON a motion to quash an indictment, the charge in the indictment appeared to be; that the defendant did unlawfully and injuriously knock violently at the outer door of the prosecutor's dwelling-house for the space of two hours together; whereby the family of the prosecutor was greatly disturbed; and the prosecutor's wife was so much frightened, that she miscarried soon after.

An indictment, for knocking violently at the door of a house, ought not to be quashed.

The court refused to make a rule to shew cause.

And by *Ryder Ch. J.*—It has been said; that as there is not a charge of a forcible entry, the proper remedy of the prosecutor is an action of *trespass*: But it is sufficient to say, without giving any opinion as to the goodness of the indictment, that it would be very improper for the court to exercise its discretionary power of quashing an indictment, in a case wherein the knocking at the door of a dwelling-house was so violent, so long continued, and followed with such consequences as it was in the present case.

Pantfune *vers.* Marshall.

The plaintiff, in an action for maliciously prosecuting an action, must shew that the former action is determined in his favour.

IN an action, for the malicious prosecution of an action, the plaintiff declared; that the defendant levied a plaint against him in the court of *Newcastle upon Tyne*; that in order to hold the plaintiff to special bail, the defendant made an affidavit, that the plaintiff was indebted to him in the sum of two hundred pounds, whereas the plaintiff was not in fact indebted to the defendant in the sum of two hundred pounds, nor in any other sum of money; that upon this affidavit the plaintiff was arrested, and for want of putting in special bail was confined in goal; and that after being some time confined, he was discharged without putting in special bail; because he was not bound, either by the law of the land, or by the custom of the court of *Newcastle*, to put in special bail.

Upon a demurrer to this declaration, the question was, Whether it was necessary for the plaintiff to alledge, that the action in the court of *Newcastle* was determined in his favour, before the present action was brought?

It was holden, that this ought to have been alledged.

And by *Denison J.*—It is a settled point; that if an action be brought for maliciously prosecuting an indictment, the plaintiff must alledge, that he was acquitted before the action was brought.

It is alledged in the present case, that the plaintiff was discharged without putting in special bail: But it does not follow, that the demanding of special bail was malicious; for the

the discharge might be by reason of some defect in the affidavit for holding to special bail, and not for want of a sufficient debt to hold thereto. In the case of *Skinner v. Gunton and Others*, 1 *Saund.* 228. it is said; that although the want of alledging, in an action like the present, that the former action was determined in favour of the plaintiff, either by a nonsuit, discontinuance or verdict, would be cured by a verdict, it is bad upon a demurrer. In the case of *Reynolds v. Reynolds*, *Mich.* 22. G. 2. in this court, the authority of the case of *Skinner v. Gunton and Others*, was recognized; and it was said in the latter case, that actions for malicious prosecutions ought not to be encouraged.

Rex vers. Davis.

UPON a motion in arrest of judgment in an indictment, it appeared; that the defendant was an overseer of the poor; and that the charge in the indictment was, that he refused to receive a *Pauper*, who was removed by an order of two justices of the peace. An indictment will lie against an overseer for not receiving a *Pauper*, removed by an order of two justices of the peace.

The rule was discharged.

And by *Ryder Ch. J.*—It has been said; that as the offence of an overseer of the poor, in not receiving a *Pauper* removed by an order of two justices of the peace, is a new offence created by the 3 & 4 *W. & M. c. 11.* an indictment will not lie, another remedy being given by that statute; namely, “ that “ if any overseer of the poor shall refuse to “ receive a person, removed by warrant of “ two justices of the peace from one county, “ city, or town corporate to another, he shall “ forfeit the sum of five pounds, to the use

“ of the poor of the parish from which the
“ said person was removed, to be levied by
“ distress and sale of the offender's goods, by
“ warrant under the hand and seal of any
“ justice of the peace of the county, city or
“ town corporate, to which the said person
“ was removed; and for want of sufficient
“ distress, the said justice shall commit the
“ offender to the common goal, there to re-
“ main without bail or mainprize for the
“ space of forty days.”

We are of opinion; that, as a power of removing a person likely to become chargeable to a parish is given to two justices of the peace, by the 13 & 14 C. 2. c. 12. the not receiving of a person, removed by an order of two justices of the peace, is an offence against that statute, and consequently an indictment will lie. But if this were a new offence, created by the 3 & 4 W. & M. c. 11. yet an indictment will, in our opinion lie, in case the removal was to a place within the jurisdiction of the justices by whom the order of removal was made, the remedy by the latter statute being only given, where the removal was to a place out of their jurisdiction. It does not appear from the indictment in the present case, that the removal was to a place out of the jurisdiction of the justices by whom the order was made: and if intendment were necessary, the court would in support of the verdict intend, that it was to a place within their jurisdiction.

Rex

Rex *vers.* Read.

UPON a rule to shew cause, why the judgment in an information in the nature of a *quo warranto* should not be set aside with costs, for irregularity, it appeared; that a copy of the replication was delivered, during the last vacation after nine of the clock in an evening; that no rule to rejoin was given; that a summons, for the prosecutor's clerk in court to shew cause, why the defendant should not have further time to rejoin, was issued by *Denison* J. that the clerks in court of both parties did attend upon this summons; that some doubt arising, as to the giving of further time to rejoin, *Denison* J. who was going out of town, recommended it to both the clerks in court to attend the chief justice, which both, as he apprehended, did consent to do; and that before any thing further was done, the prosecutor's clerk in court signed judgment.

A judgment signed pending a judge's summons, set aside.

The rule was made absolute.

And by the court—It has been said; that the delivery of the copy of the replication after nine of the clock in an evening was irregular; and that a rule to rejoin ought to have been given: But, as it appears from the master's report, that, by the practice of the crown office, a copy of a replication may be delivered after nine of the clock in an evening; and that when a copy of a replication is delivered in the time of vacation, it is not necessary to give a rule to rejoin, there is no reason to set aside the judgment on either of these accounts.

It

It has been said ; that it is not irregular to sign judgment, pending the summons of a judge ; and it is in the general true, that the summons of a judge does not stay any proceeding : Yet the judgment ought, in the present case, to be set aside, and with costs ; because, upon considering all the circumstances of the case, we are of opinion, that the signing of it was exceedingly improper.

Ribout *vers.* Wheeler.

Execution cannot be taken out, after the allowance of a writ of *error coram vobis*, without leave of the court.

UPON a rule to shew cause, why a writ of *Fieri Facias* should not be set aside, and why the money levied thereupon should not be restored, it appeared ; that a writ of *error coram vobis* had been brought upon a judgment and allowed ; that the plaintiff's attorney had been served with the notice of the allowance, before the writ of *Fieri Facias* was sued out ; that the writ of *error* was not determined ; and that the writ of *Fieri Facias* was sued out without leave of the court.

The rule was made absolute.

And by Denison J. (*Ryder Ch. J. and Wright J. being absent*)—Before a writ of *error coram vobis*, it not being a writ of *right*, is allowed ; there must be an affidavit of some error in fact, by which, in case the fact to be assigned for error is true, the plaintiff's right of action will be destroyed. A writ of *error coram vobis* is not a *superfedeas* in itself : But although it be not, execution cannot be taken out upon the judgment whilst it is depending without leave of the court. It would be very unreasonable, that it should be in the power of

of the plaintiff, to take out execution upon the judgment without leave of the court, whilst a question is depending concerning a fact, by which, if it be true, the plaintiff's right of action will be destroyed.

Rex vers. Brookes.

UPON a rule to shew cause, why judgment should not be arrested in an indictment, the charge in the indictment appeared to be; that the defendant dug two gripps or ditches in a certain passage or common footway; one of which was in depth six feet, and in width twelve feet; the other in depth six feet, and in width thirteen feet; to the nuisance of all the king's subjects.

It is not always necessary to set out the length of the nuisance, in an indictment for a nuisance.

The rule was discharged.

And by *Denison J.* (*Ryder Ch. J.* and *Wright J.* being absent)—It has been said; that the passage or footway is not alledged to have been a passage or footway, from time whereof the memory of man is not to the contrary: But we are of opinion, that it was not necessary to alledge this; for a highway may have become so, by a dedication of a right of passage therein to the use of the publick, within time of memory; and it is certain, that many streets in the city of *Westminster* have become highways, within time of memory.

It has been said; that the footway or passage is not alledged to be a common way for all the king's subjects; and that an indictment will not lie for a nuisance in a way, unless the way be common for all the king's subjects: But the gripps or ditches in the footway or
passage

passage are alledged, to be to the nufance of all the king's subjects; which in *Thrower's* case, 1 *Ventr.* 208. was holden to be a sufficient allegation, that the way, wherein the nufance was alledged to be, was a common way for all the king's subjects.

It was likewise said; that the length of the nufance is not set out; and it was added; that this ought always to be set out in an indictment for a nufance in a way, for that otherwise the court, in case there be a conviction, cannot judge what fine ought to be set.

Denison J. inclined to be of opinion, that the length of the nufance ought always to be set out in an indictment for a nufance in a way; not for the sake of enabling the court to set a proper fine; but that the defendant may the better know how to prepare for his defence.

Foster J. inclined to be of opinion; that it is not always necessary to set out the length of the nufance in an indictment for a nufance in a way.

After taking time to consider, the two justices concurred in opinion; that it was not in the present case necessary to set out the length of the nufance.

And by *Denison J.*—The gripps or ditches might, in the present case, be dug quite across the footway or passage; in which case the nufance would entirely consist in the depth and width of the gripps or ditches; and the court ought, after a verdict of guilty, to intend that this was the case.

Rex

Rex *vers.* Burgefs.

IN an indictment, for obstructing a certain highway through *Richmond* Park, there was only one count, in which it was alledged, that all the king's subjects have a right of passing on foot, on horseback, and in carriages, in and through the said highway.

Upon the trial at bar of an issue joined upon the plea of not guilty, a right of passing on foot in and through the said highway was proved: But as there was not a count in the indictment for a footway only, the direction of the court to the jury was, that they ought to find the defendant not guilty, and a verdict of not guilty was found.

A defendant cannot be found guilty of obstructing a footway, unless the obstruction of a footway only be charged in the indictment.

Rex *vers.* Bennet.

UPON a rule to shew cause why the defendant, who was an attorney, should not pay his client the sum of nineteen pounds, together with the costs of this application, it appeared; that *J. S.* was arrested at the suit of his client for the sum of nineteen pounds, and was in custody; that the defendant had taken a security from *J. S.* to his client for that sum, and discharged him out of custody; and that the defendant, at the time of taking the security, knew it to be worth nothing.

The rule was made absolute.

And by *Ryder* Ch. J.—It is highly reasonable, that an attorney who has misbehaved in so gross a manner, should make a satisfaction to his client.

An attorney compelled to pay the money due upon a bad security taken by him for his client.

Rex *vers.* The Inhabitants of Yarmouth.

It is not necessary that an indenture, if the money given with an apprentice was only sixpence, should be stamped.

IN an order of sessions it was stated; that the *Pauper* served an apprenticeship in the parish of *Yarmouth*, under an indenture in which the consideration money mentioned was sixpence; and that the indenture was not stamped as is directed by the 8 *Ann. c. 9*,

The question was, Whether the *Pauper* gained a settlement in the parish of *Yarmouth*?

It was holden that he did.

And by *Ryder Ch. J.*—As the duty due upon the consideration money mentioned in this indenture, was only three-fifths of a farthing there is no coin small enough to pay it in; and consequently the indenture could not be stamped as is directed by the 8 *Ann. c. 9*. In the case of *Baxter v. Fairlam*, *East. 19 G. 2.* in this court, it was holden, that an indenture of apprenticeship, in which the money given with the apprentice appeared to be sixpence, was not void for want of being stamped as is directed by the 8 *Ann. c. 9.* for that every such case falls under the maxim, *de minimis non curat Lex.*

Rex

Rex *vers.* The Inhabitants of Lechlade.

IN an order of sessions it was stated; that the *Pauper* was the son of a man, who together with his wife came to reside under a certificate in the parish of *Lechlade*; that he was born in that parish after his father came to reside under the certificate; and that he was hired as a servant for a year in that parish; and that he served the year.

The question was, Whether the *Pauper* gained a settlement in the parish of *Lechlade*?

It was holden that he did not.

And by *Ryder Ch. J.*—It has been said; that the 9 and 10 *W. 3. c. 11.* by which it is enacted, “that no person whatsoever, who
“shall come into any parish by a certificate,
“shall be adjudged by any act whatsoever to
“have procured a legal settlement, unless he
“shall, *bona fide*, tak ea tenement of the value of ten pounds, or shall execute some
“annual office in such parish, being legally
“placed in such office,” does not extend to the present case; because the *Pauper* did not come into the parish of *Lechlade* by a certificate. If the present were a new case, we should be of opinion; that as the *Pauper* was born whilst his father resided in the parish of *Lechlade* under a certificate, he is within the meaning of that statute, although he be not within the letter: But it is not a new case. In the case of *Rex v. The Inhabitants of Sherborne, Eaſt.* 15 *G. 2.* it was holden; that the son of a certificate man, born in a parish whilst his father resided therein under a certificate, did not gain a settlement by a hiring for a year, and serving the year in that parish.

A son, been in a parish after his father came to reside under a certificate cannot gain a settlement by a hiring and service in that parish.

Tourville *vers.* Pony.

A new replication may be after two terms.

UPON a rule to shew cause, why the plaintiff should not withdraw his replication and reply again, it appeared; that the replication intended to be withdrawn was of *Easter* term last; and that issue was joined in the cause.

The rule was made absolute.

And by the court—It has been said; that a new count cannot be added after two terms; and it is inferred, that therefore a new replication ought not to be allowed after two terms: But there is a wide difference betwixt the two things; adding a new count is for a new cause of action; whereas a new replication is in the nature of an amendment, for the making of which no time is limited.

Mordecai *vers.* Solomon.

Costs ordered to be paid by the attorney in a cause.

UPON a rule to shew cause, why the plaintiff's attorney should not pay the costs of a judgment of *Nonprofs*, and the costs of the present application, it appeared; that the plaintiff's brother had frequently employed the attorney, and always paid him well; that the plaintiff's brother had undertaken to pay the attorney in this cause, but that he did not bring some money applied for by the attorney; that judgment of *Nonprofs* was signed for making up the issue; and that the plaintiff was in prison for not paying the costs of the judgment.

The

The rule was made absolute.

And by the court—When an attorney has commenced a suit upon the credit of a client, he ought to proceed in it, although the client do not bring him money every time he applies for it.

Besides making the rule absolute, it was thrown out by the court, that it would be proper for the attorney to take care, that the plaintiff should be immediately discharged out of prison.

Hilary

Hilary Term,

28 Geo. 2. 1755.

Sir Dudley Ryder, *Chief Justice.*

Sir Martin Wright,
Sir Thomas Denison,
Sir Michael Foster,
Sir J. Eardley Wilmot, } *Justices.*

MEMORANDUM. Towards the latter end of this term, Sir *John Eardley Wilmot* took his seat as one of the justices of this court, in the room of Sir *Martin Wright*, who had surrendered his patent.

Rex vers. Stirling.

The return to a *mandamus* holden to be bad, by reason of its being uncertain.

THE return to a *mandamus* directed to the defendant, for restoring *Joseph Hall* to the office of parish clerk, was; that the office of parish clerk being at a certain time vacant, and the defendant, to whom it belonged as vicar to appoint thereto, not being at that time able to find a person proper for the

the office, did appoint *Joseph Hall* thereto, until he should be able to find a proper person; that *Hall* was no otherwise appointed; that he was never admitted, or licensed, as parish clerk by the ordinary; that the defendant having since found a person proper for the office, he had removed *Hall*, and appointed that person thereto; and that therefore he could not restore *Hall* to the office of parish clerk.

The return was holden to be bad; and a peremptory *mandamus* was awarded.

And by *Ryder Ch. J.*—As the office of parish clerk is *prima facie* an office of life, *Hall* did by the appointment acquire a freehold in the office, unless the defendant had a power of appointing thereto during pleasure; and it does not appear, that the defendant had such a power. It is the duty of the person, to whom a *mandamus* is directed to obey the writ, or to return a cause for not obeying it in such precise terms, that the truth thereof may be tried in an action for a false return; or that, if the truth of the cause returned be admitted, the court may be able to judge of the goodness thereof: Whereas the cause returned in the present case is so uncertain, that the truth thereof cannot be tried in an action for a false return; nor can the court, in case the cause returned be true, judge of its goodness.

Rex

Rex *vers.* Hord.

A conviction
for a forcible
entry quashed.

UPON a rule to shew cause, why a conviction for a forcible entry should not be quashed, it appeared; that a fine was set upon the person convicted: But there was no adjudication, that he shall be committed until the fine is paid.

The rule was made absolute.

And by the court—There ought to be an adjudication, that the person, upon whom a fine is in such case set, shall be committed until the fine is paid.

Pawson *vers.* Scott.

The ordinary
may grant a
faculty for
erecting a gal-
lery in a cha-
pel.

UPON a rule to shew cause, why a writ of *prohibition* should not be awarded to an ecclesiastical court, it appeared; that under the 2 G. 2. c. 16. which is declared to be a public statute, a chapel had been built in the town of *Leeds*; that a power was given by that statute to the curate of the chapel, of selling the inheritance in the pews in the chapel; that *Pawson* had purchased one of the pews of *Scott* the curate; that *Scott*, upon a suggestion that more pews were wanted in the chapel, had instituted a suit in the ecclesiastical court for a faculty to erect a gallery; that the granting of the faculty was opposed by *Pawson*, who suggested, that the erection of the gallery would be detrimental to his pew, by preventing, in some degree, the access of light and air thereto; and that there was a sentence for the faculty.

One

One question was, Whether it be not too late to apply in any case, after the sentence of an ecclesiastical court, for a prohibition?

It was holden that it is not.

And by *Ryder Ch. J.*—The sentence is, in almost all cases, the grievance complained of; and it is not in every case too late to apply for a prohibition after a sentence. In the case of *Gardner v. Booth*, *Salk.* 548. it is laid down; that a prohibition to an ecclesiastical court may be applied for after a sentence, in any case wherein the ecclesiastical court had not jurisdiction.

Another question was, Whether it be proper to award a prohibition in the present case?

It was holden that it is not.

And by *Ryder Ch. J.*—It has been said; that a right to a freehold is in question, and consequently that the ecclesiastical court had not jurisdiction: But this is not the case; for the question is not as to the right of *Parson* to a freehold in the pew, it being only as to the extent of that right. The freehold of a church is always in the parson, and the freehold of a church-yard is always in the church-wardens of the parish; and yet the ordinary has a jurisdiction as to all erections and ornaments in the church; and in the case of *Quilter v. Newton*, *Carth.* 152. it is laid down, that a nuisance in the church-yard is of ecclesiastical cognizance. The maxim, *cujus est solum ejus est usque ad Cælum*, does not apply to the case of a freehold in a pew; in as much as, the right of freehold in a pew does only extend to sitting and hearing divine service therein. The owner of a pew cannot either dig a vault under it, or erect any thing over it, without a faculty from the ordinary.

A a

The

The principal question, namely, whether it be necessary to erect a gallery in this chapel, is proper for the determination of an ecclesiastical court; it being the province of the ordinary, to regulate every thing which relates to the exercise of divine service in a church or chapel; and there is no instance of a prohibition being awarded to an ecclesiastical court, in a case like the present.

It is not a good objection to the erecting of a gallery in this chapel, that the pew of *Pawson* will not be so airy, or so light as it was before; for it is utterly impossible to erect a gallery in any church or chapel, by which the access of light and air to one or more pews will not be in some degree prevented: But an inconveniency to one or more persons must, in such case, be submitted to, that many persons may have an opportunity of attending divine service.

It has been said; that the right of *Pawson* to the pew in this chapel, it being a right of inheritance purchased under an act of parliament, is very different from the right which persons in the general have to pews in churches and chapels: But all the rights of the ordinary are expressly saved by the act; and the right of granting a faculty for erecting a gallery is one of those rights.

It has been said; that an action upon the case will lie in a temporal court for the nuisance to *Pawson's* pew, by erecting the gallery; and it is inferred, that a prohibition ought to be awarded to the ecclesiastical court, lest the judgments of the two courts should be different: But there is no instance of such an action's having been brought. It ought likewise

likewise to be remembered, that there are divers cases, wherein temporal and ecclesiastical courts have a concurrent jurisdiction; and it is probable, that the sentence of an ecclesiastical court may, in every case wherein the two courts have a concurrent jurisdiction, be pleaded to an action in a temporal court.

Portman *vers.* Okeden.

IN a case reserved, in an action *qui tam*, it was stated; that the action was for the penalty of five pounds, given by one of the statutes made for the preservation of the game; that a moiety of the penalty was given to the poor of the parish wherein the offence was committed; and that at the trial of the cause it was ruled; that an inhabitant of the parish wherein the offence was committed, who was assessed to the poor's rate, was not a competent witness for the plaintiff.

In an action for a penalty, part of which is given to the poor of a parish, an inhabitant of the parish rated to the poor is not a competent witness.

The question was, Whether the inhabitant was a competent witness for the plaintiff?

It was holden that he was not.

And by *Denison* J. (the Ch. J. and *Wright* J. being absent)—It has been said; that the part of the penalty given to the poor of the parish ought to be considered as a bounty to the poor: But there is no ground for so considering it; for that part of the penalty is to be paid to, or to be distrained for by the overseers of the poor, and it is always brought to the account of the parish.

It has been said; that in the case of *Rex v. Wyatt*, *Pasch.* 13 G. 2. it was holden; that an inhabitant of a parish was a competent witness for the parish: But it did not in that

case appear, that the inhabitant was assessed to the poor's rate of the parish; and as that did not appear, the court would not intend it.

No case has been cited, in which it was holden; that a person, who is assessed to the poor's rate of a parish, is, in the general, a competent witness for the parish; and it may fairly be inferred from the 3 & 4 W. & M. c. 11. whereby it is provided, that a person who is assessed to a poor's rate of a parish may, in a certain case, be a witness; that such a person is not in the general a competent witness for the parish.

Norton *vers.* Voules.

If an attorney is plaintiff, the *Venue* may be always laid in the county of *Middlesex*.

UPON a rule to shew cause, why a rule, which had been made for changing the *venue* from the county of *Middlesex* to the county of *Berkshire*, should not be discharged, it appeared; that the rule for changing the *venue* had been made upon the common affidavit; and that the plaintiff was an attorney of this court.

The rule was made absolute.

And by the court——It is a part of the privilege of an attorney of this court, that he may lay the *venue* in an action brought by himself in the county of *Middlesex*; and the court will not deprive him of this part of the privilege, unless there be some very particular and strong reason for so doing.

Arnold *vers.* Squire.

UPON a rule to shew cause, why the inquisition upon a writ of *enquiry* should not be set aside, it appeared; that the sign, of the house at which the writ was to be executed was not mentioned in the notice of executing it; and that it was not expressed in the notice, that the writ was to be executed between two certain hours.

In what manner the notice of executing a writ of *enquiry* must be given.

The rule was made absolute.

And by the court—It is necessary that the sign of the house, at which a writ of *enquiry* is to be executed, should be mentioned in the notice of executing it, and that it should be expressed in the notice, that the writ will be executed between two certain hours.

Moir *vers.* Munday.

IN a case reserved, in an action of *trespass*, it was stated; that by one custom of the city of *Oxford*, if a person, who is not a freeman of the said city, expose goods to sale in the said city, except in fairs or markets, he is liable to the payment of six shillings and eight pence to the two bailiffs of the said city, by way of penalty; that by another custom of the said city, in case the said penalty be incurred, and be not paid upon demand, all the goods exposed to sale may be distrained, and detained until it is paid; that the plaintiff, not being free of the said city, did expose goods to sale contrary to the said custom; that a demand was made of the said penalty; that

A custom to distrain various goods, which are of a great value, for a small penalty is bad. An action of *trespass* lies for making a distress, if there was no right of distraining.

that upon the refusal of the plaintiff to pay the same, all the goods exposed to sale were distrained by the defendant, who was at that time one of the bailiffs of the said city; and that the value of the goods distrained, which were of various sorts, was one hundred pounds.

The question was, Whether the plaintiff be entitled to recover?

It was holden, upon great consideration, that he is.

And by *Ryder Ch. J.*—The general question, submitted to the court by this case, namely, whether the plaintiff be entitled to recover, depends upon divers other questions.

One of these is, whether a custom of a city, by which every person, not being a freeman of the city, who exposes goods to sale in the city, except in fairs or markets, is liable to a penalty, be good?

We are of opinion, that such a custom is good, provided the penalty be reasonable; and that the penalty in the present case is reasonable. It is laid down in *Waganor's case*, 8 *Rep.* 126. that a custom to restrain a man from exercising his trade in a particular place is good.

Another of these questions is, whether a custom of a city to exclude a foreigner from exposing goods to sale in the city, which does not except victuals, be good?

We are of opinion, that it is not necessary to the validity of such a custom, that victuals should be excepted. In *Waganor's case* the sale of victuals was not excepted, and yet such a custom was holden to be good.

Another

Another of these questions is, whether a custom to distrain for a penalty due by custom be good?

We are of opinion, that such a custom is good. It is laid down in *Waganor's* case, and has been holden in divers cases; that a power of distraining for a penalty due by custom may be given by a by-law; and it seems to be equally reasonable to hold, that a power of distraining for a penalty due by custom may be given by a custom, as it is to hold, that a power distraining for such a penalty may be given by a by-law.

Another of these questions is, whether, as the penalty is to be paid to the two bailiffs of the city of *Oxford*, one of them could distrain for it?

We are of opinion, that as it does not appear, that the penalty is to be appropriated to the use of the corporation, it must be intended, that it is to be paid to the bailiffs for their own use; and if this be so, either of them might distrain for it.

Another of these questions is, whether a custom, to distrain all the goods exposed to sale for the penalty of six shillings and eight pence, be good?

We are of opinion, that such a custom is not good. If the custom had been, to distrain such of the goods exposed to sale as shall be sufficient to satisfy the penalty, it would have been good; and if only one thing had been exposed to sale, this, although it had been a diamond worth a thousand pounds, might have been distrained for the penalty: But a custom to distrain all the goods exposed to sale, although they are of various sorts and of great value, for so very small a penalty, is quite unreasonable. In *Godfrey's* case, 11
Rep.

Rep. 44. it is said; that *excessus in re qualibet jure reprobatur communi*. In the case of *Hargrave v. Wood*, 2 *Lutw.* 1457. it is laid down; that it is unlawful to attach various goods, which are of great value, for a small debt. It has been said; that a carrier may detain all the goods delivered to him, for a small sum due for the carriage of the goods: But there is wide difference betwixt a power of detaining the goods which are in a man's possession, upon which he has a lien, and a power of distraining goods which are not in a man's possession. The power of distraining, given by the custom, has been compared to the power of distraining all the beasts which are *damage feasant*, although very little damage has been done: But the cases are by no means similar. It is always necessary, that all the beasts which are *damage feasant* should be distrained, in order to prevent a continuance of the injury: But, if a part of the goods exposed to sale are sufficient to satisfy a penalty, it never can be necessary to distrain all the goods for the penalty.

The last of these questions is, whether, although the plaintiff have a right of action, he can recover in the present action?

We are of opinion that he is entitled to recover. It has been said; that in the case of *Lynne v. Moody*, *Mich.* 3 *G.* 2. in this court, which was a writ of *error* brought upon a judgment of the court of common pleas, it was holden; that an action of *trespass* does not lie for an excessive distress, the remedy being by an action upon the statute of *Marlbridge*: But that case was by no means like the present. In that case, which was a distress for rent in arrear, there was a right to distrain; and as nothing was done after

after the distress, to make the distraining a *trespass ab Initio*, there was in fact no trespass: But if our opinion be well founded, that the custom to distrain all the goods exposed to sale, although they are of various sorts and of great value, upon which alone the right to distrain in the present case could be grounded, is not good; the defendant had not any right to distrain; and there is not the least room for doubt, that, if a distress be made by a person not having a right to distrain, an action of trespass will lie.

Hesketh *vers.* Gray.

AN action of debt being brought upon a bond in the penalty of five thousand pounds, and *Oyer* being prayed of the bond, it appeared from a recital therein; that *Robert Hesketh*, the plaintiff, had presented *John Gray*, the defendant, to the vicarage of *Steyning* in the county of *Sussex*; and that it was agreed betwixt them, that the said *John* should, within three months after the expiration of six years, to commence from the day of the date of the bond, at the request of the said *Robert*, his heirs, executors, administrators or assigns, resign and deliver up the said vicarage into the hands of the proper ordinary, so that it may become vacant, and the said *Robert*, his heirs, executors, administrators or assigns, may present anew. It likewise appeared; that the condition of the bond was; that if the said *John* shall, within three months after the expiration of six years, to commence from the day of the date of the bond, at the request of the said *Robert*, his heirs, executors, administrators or assigns, resign and deliver up the said vicarage into the hands of the

If an obligor undertake for the act of a stranger, he must procure the act to be done.

B b

proper

proper ordinary, whereby it may become vacant, and the said *Robert*, his heirs, executors, administrators or assigns, may present anew, then the obligation to be void.

The defendant pleaded ; that he did, within three months after the expiration of the six years mentioned in the condition of the bond, at the request of the said *Robert*, offer to resign and deliver up into the hands of *Matthias*, Lord Bishop of *Chichester*, who was the proper ordinary, the said vicarage, for the said ordinary to accept the same, whereby the said vicarage might become vacant, and the said *Robert* might present anew ; and that the said ordinary did then refuse, and from thenceforth hitherto hath refused to accept such resignation.

Upon a demurrer to this plea, it was holden to be bad ; because it is not therein averred, that the bishop accepted the resignation.

And by *Ryder Ch. J.*—The defendant, by undertaking to resign, so that the vicarage may become vacant, and the plaintiff may present anew, has undertaken for the bishop's acceptance of a resignation ; which, according to what is laid down in *Fane's case*, *Cro. Ja.* 198. is necessary to the completion of a resignation.

Several cases have been cited, in which it has been holden ; that if a third person, who is a trustee for the obligee, refuse to do an act, for the doing of which the obligor has undertaken, the penalty of the bond is saved : And in order to bring the present case within the reason of those cases, it has been said ; that the bishop is to be considered as a trustee for the obligee. If the bishop were a trustee for the obligee, it would be in the obligee's power to compel him to accept a resignation ;
it

it being always in the power of a *cestui que trust* to compel his trustee to execute the trust: But it is not, in the present case, in the power of the obligee to do this; and consequently, the bishop is not to be considered as a trustee for the obligee.

We are of opinion, that the bishop is, in the present case, a stranger to the obligee; and if this be so, it was incumbent upon the obligor to procure his acceptance of a resignation. In 1 *Roll. Abr.* 452. 5 *Rep.* 23. and 1 *Saund.* 216. it is laid down; that if the obligor undertake for the act of a third person, who is a stranger to the obligee, it is incumbent upon the obligor to procure the act to be done; unless there were at the time of entering into the bond an impossibility of doing the act, or unless the doing thereof have been since rendered impossible by the act of God, or by the act of law.

Maxwell *vers.* Sharp.

UPON a writ of *error*, brought upon a judgment of the Court of King's Bench in *Ireland*; by which a judgment of the court of common pleas in *Ireland* was affirmed, it appeared; that *Sharp* the plaintiff in the original action, which was an action of *Assumpsit*, had alledged in his declaration; that by an agreement in writing, entered into betwixt him and *Maxwell* the defendant in that action, it was agreed; that *Sharp* should transfer to *Maxwell* two thousand pounds, *London* assurance stock, at the day of the next opening of the transfer books of the said stock; and that *Maxwell* should pay the sum of two

A verdict, for the finding of which there was sufficient evidence, is good, altho' improper evidence was admitted.

thousand four hundred and sixty pounds to *Sharp* for the said stock; that at the day of the next opening of the said books *Sharp* was ready, and continued to be ready until the shutting of the said books that day, to transfer the said stock to *Maxwell*; that neither *Maxwell*, nor any person on his behalf, came to accept the said stock; and that *Maxwell* has not since paid the sum of two thousand four hundred and sixty pounds to *Sharp*.

It appeared from a bill of exception; that *Helbut*, a broker, gave evidence, that upon the 19th day of *August* 1720, he bought on the account of *Sharp* and *Abbot* two thousand pounds *London* assurance stock, which was transferred to *Sharp* only; that the same day a parol agreement was made, betwixt *Sharp* and *Abbot*, and *Maxwell*, for the sale of the stock to *Maxwell*; that a note in writing was given by *Sharp* to *Maxwell*, by which he agreed to transfer the stock to *Maxwell*, at the day of the next opening of the transfer books of the stock; that another note in writing was given by *Maxwell* to *Sharp*, whereby he agreed to accept the stock at the day of the next opening of the books, and to pay the sum of two thousand four hundred and sixty pounds to *Sharp* for the same; and that *Sharp* and *Abbot* sustained a considerable loss, by being obliged to borrow money at high interest to pay for the stock. It did likewise appear from the bill of exceptions; that in the register of the contract for the sale of the stock, the contract was mentioned to be betwixt *Sharp* and *Abbot*, and *Maxwell*; that the register was not signed by any of the parties to the contract; and that the note from *Sharp* to *Maxwell*, and the note from *Maxwell* to *Sharp*, were set forth at large in the register.

The

The judgment was upon great consideration affirmed.

And by *Ryder* Ch. J.—It has been said; that the declaration in the original action is bad; because it is not therein alledged, that there was an actual transfer of the stock. This objection to the declaration is founded upon a supposition, that the transfer of the stock was a condition precedent: But we are of opinion; that there were, in the present case, two mutual and independent contracts, for the breach of either of which an action would lie. If the transfer of the stock were, in the present case, a condition precedent, the declaration would nevertheless be good; for as *Sharp* was ready to transfer the stock, he is, agreeably to what is laid down in the case of *Lancashire v. Killingworth*, Lord Raym. 686. as well entitled to the money agreed for, as if it had been actually transferred.

It has been said; that the evidence, it being of an agreement betwixt *Sharp*, and *Abbot*, and *Maxwell*, did not maintain the declaration in the original action, in which an agreement betwixt *Sharp* and *Maxwell* is alledged. If the parol agreement, of which evidence was given, were inconsistent with the written agreement contained in the note from *Maxwell* to *Sharp*, that evidence ought not to have been admitted; it being a settled point, that evidence of a parol agreement, which is inconsistent with a written agreement, ought not to be admitted: But we are of opinion, that the parol agreement, of which evidence was given, is by no means inconsistent with the written agreement. Instead of being inconsistent therewith, the parol agreement is an agreement between *Sharp* and *Maxwell*: For as the legal interest in the stock was in
Sharp

Sharp alone, he only could, with propriety, agree for the sale thereof; and consequently, the participation of *Abbot* in an agreement betwixt *Sharp* and *Maxwell*, notwithstanding he had an equitable interest in a moiety of the stock, could only amount to a confirmation of the agreement.

It has been said; that the register of the contract for the sale of the stock was not signed by the parties thereto, as is by the 7 G. 1. stat. 1. c. 1. required: But where the whole contract for the sale of stock is registered, as was done in the present case, it is not required by that statute, that the register should be signed by the parties thereto; the signing of the register being only required, where an abstract or a memorial of the contract is registered. In the case of *Ashley v. Kinaston*, Mich. 11 G. 1. it was ruled; that where the whole contract for the sale of stock is registered, it is not necessary that the register should be signed by the parties thereto.

It has been said; that the verdict in the original action is bad; because evidence was admitted of a loss sustained by *Abbot* as well as *Sharp*, by the borrowing of money at high interest to pay for the stock. But, as there was sufficient evidence to warrant the finding of the verdict as it is found, and it does not appear, that any regard was paid by the jurors to this evidence, the court will not intend that any regard was paid. The court will rather intend, in support of the verdict, that the jurors rejected this evidence as superfluous.

A writ of *error* was brought upon the judgment of this court in the House of Lords; in which there was judgment of *nonprofs*.

Kearle

Kearle qui tam *vers.* Boulter.

IN an action, brought for the penalty given by the 5 *Ann. c. 14.* it was found by a special verdict; that the defendant carried on the trade of a poulterer; that for the carrying on of this trade he kept an open shop, wherein he bought and sold geese, chickens, and other poultry; that he had a hare in his custody, and did sell the hare to J. S. for four shillings; and that at the time of having the hare in his custody, and of selling it, he was seised in fee of an estate of one hundred pounds a year.

A poulterer is not liable to a penalty, for having a hare in his custody.

The question was, Whether the plaintiff ought to recover?

It was holden upon great consideration that he ought not.

And by *Ryder Ch. J.*—By that clause of the 5 *Ann. c. 14.* upon which the present action is founded, it is enacted, “ that if any higler, “ chapman, carrier, inn-keeper, victualler “ or alehouse-keeper, shall have in his custody “ or possession any hare, pheasant, partridge, “ moor, heath game or grouse, or shall buy, “ sell, or offer to sale any hare, pheasant, partridge, moor, heath game or grouse, every such higler, chapman, inn-keeper, victualler, alehouse-keeper, or carrier, unless “ such game in the hands of such carrier be “ sent him by a person qualified to kill the “ game, shall forfeit for every hare, pheasant, “ partridge,

“ partridge, moor, heath game or grouse, the
“ sum of five pounds.”

It has been said; that every person, who buys and sells goods in an open shop, is a trader; and that every trader is a chapman; for that the *German* word *copeman*, from which the *English* word *chapman* is derived, does signify a trader: But we are of opinion; that although the defendant be a chapman in the large sense of the word, he is not a chapman within the meaning of the 5 *Ann. c. 14.* In order to come at the meaning of a word contained in a statute, the mischief intended to be remedied by the statute ought to be taken in consideration. It appears from the preamble of the 5 *Ann. c. 14.* that the mischief, intended to be thereby remedied, was the buying or receiving of game from loose idle persons. In order to remedy this mischief, innkeepers, victuallers and alehouse-keepers are prohibited from having game in their custody or possession; because it is probable, that these persons will frequently buy or receive game from loose idle persons, in order to have money spent at the eating thereof in their houses. Higlers and carriers are likewise prohibited from having game in their custody or possession; because it is probable, that these persons will frequently buy or receive game from loose idle persons in one place, in order to sell it at another. Chapmen are likewise prohibited from having game in their custody or possession: But the sound construction seems to be, that the word *chapman* in this statute, and the rather, because it is inserted betwixt the words *bigler* and *carrier*, does only mean a trader who trades from place to place. It being as probable, that such traders will frequently buy or receive game from loose idle persons

persons in one place, in order to sell it at another, as that higlers and carriers will. It was reasonable to prohibit such traders from having game in their possession: But it never could be the intention of the legislature, to prohibit every trader from having game in his custody or possession.

It has been said; that, although the opinion of the court shall be, that the defendant is a chapman within the meaning of the 5 *Ann. c.* 14. yet the plaintiff ought not to have judgment; because the jurors, whose province it was to determine, whether the defendant be such a chapman, have only found facts, and have not found expressly that he is. But as the question, whether the defendant be a chapman within the meaning of that statute, does in a great measure depend upon the construction of the statute, we are of opinion; that it is a question proper for the determination of the court; and that the facts found by the verdict, are sufficient to enable the court to determine the question. In the case of *Dodsworth v. Anderson*, 2 *Jo.* 142. it was holden; that if the proper facts are found by a verdict, it is the province of the court to determine, whether a person be a bankrupt within the meaning of any statute.

It was said; that although the opinion of the court shall be, that the defendant is a chapman within the meaning of the 5 *Ann. c.* 14. and likewise, that the question, whether the defendant be such a chapman, is proper for the determination of the court, yet the plaintiff ought not to have judgment: Because it is found by the verdict, that the defendant, at the time of having a hare in his custody, and of selling the hare, was seised in fee of an estate of one hundred pounds a year;

C c

and

and it was inferred ; that it would be strange to hold, that a person, who is by law qualified to kill all kinds of game, is liable to a penalty for having a hare in his custody, or for selling a hare.

No opinion was given by the court upon this point.

Kennon vers. Owen.

If there be manifest intention to devise an estate in fee, the construction ought to be, that such an estate is devised.

IN a case referred, in an action of ejectment, it was stated; that *Thomas Fisher* being seised in fee of an estate, part of which was copyhold, in the parish of *Barston*, he surrendered the copyhold part to the use of his will; that by a will made afterwards, he devised all his freehold and copyhold lands in the parish of *Barston* to *William Fisher*, his brother, for and during the term of his life; that after this devise, he by the same will bequeathed divers legacies, to the amount of one hundred and fifty pounds, and then added these words, “ after the decease of myself
“ and brother, and all my legacies are paid,
“ I do appoint my nephew *Abraham Fisher*,
“ to be the executor of all my real and personal estate whatsoever;” that the testator and *William* the brother are both dead; and that the testator’s personal estate did not amount to more than eight pounds.

The question was, Whether *William* the executor, does take an estate in fee in the testator’s real estate under this will?

It was holden that he does.

And by R. Ch. J.—Such a construction ought, if possible, to be put upon the words of a will, that the intention of the testator, manifestly

manifestly appearing therein, may be answered. It does appear manifestly in this will to have been the testator's intention, that the legacies bequeathed by him should be paid by *Abraham* the executor. This intention, as the legacies amounted to one hundred and fifty pounds, and his personal estate to only eight pounds, cannot be answered; unless the construction of the will be, that *Abraham* the executor takes an estate in fee in the testator's real estate.

It has been said; that the copyhold part of the testator's estate cannot pass under this will; because it is not expressly mentioned therein: But if there have been a surrender of a copyhold estate, to the use of the surrenderor's will, the estate will pass by any words in the will of the surrenderor, which amount to an appointment under the surrender; and we are of opinion, that the following words in this will, "I do appoint my nephew "*Abraham Fisher*, to be the executor of all "my real estate whatsoever," do amount to an appointment under the surrender of the copyhold part of the testator's estate to the use of his will.

Rex vers. Tew and Soame.

THE defendants, who had been found guilty upon an indictment, being brought up for judgment, it appeared; that the indictment was for an assault and battery; and that the expence of the prosecution amounted to near two hundred pounds.

As the defendants would not consent to go before the master, the court was moved to set such a fine, that a third part thereof may be sufficient to reimburse the prosecutor a considerable part of his expence.

The court refused to set a small fine, although the defendants, who had been found guilty on an indictment, would not consent to go before the master.

A fine of thirty pounds was set upon each of the defendants.

And by *Ryder* Ch. J.—It has been said, that in the case of *Rex v. Dyke and Thrice Others*, *Trin.* 21 & 22 G. 2. this court did set a very large fine upon the defendants, who were found guilty upon an indictment, with a declared intention, that the third part thereof might be sufficient to reimburse the prosecutor a considerable part of his expence: But the indictment in that case was for a publick nuisance, for which no action could be maintained; whereas the indictment, in the present case, is for private injury, for which an action might have been maintained.

Berwick vers. Symonds.

If the plaintiff proceed after he has taken money out of court, he is not entitled to costs.

UPON a rule to shew cause, why costs should not be paid to the plaintiff, it appeared; that four pounds had been brought into court upon the common rule; that after the plaintiff had taken the money out of court, he proceeded in the action; and that he has now discontinued the action.

The question was, Whether the plaintiff ought to have costs to the time of bringing the money into court?

It was holden that he ought not.

And by the court—By proceeding in the action, after the money was brought into court upon the common rule, the plaintiff forfeited his right to costs; it being a part of that rule, that

that if the plaintiff will not accept of the money brought into the court with costs, to be taxed by the master, in full discharge of the suit, the said money shall be stricken out of the declaration, and be paid out of court to the plaintiff; and upon the trial of the issue, the plaintiff shall not be permitted to give evidence for the said money.

Yates *vers.* Carlisle.

UPON a rule to shew cause, why the defendant should not have time to rejoin, it appeared; that the action was an action of trespass; that the declaration, which was for breaking down a fence, was long; that the plea was necessarily long; that the replication was very long; that the rejoinder must necessarily be very long; and that many issues must be joined.

A rule made absolute for time to rejoin in an action of trespass.

It likewise appeared; that the defendant had brought an action upon the case for erecting the fence; and that the right of erecting the fence, which is the only thing that is really in question between the parties, may be as well tried in the latter action, as in the action of trespass: And it was said; that it will be hard upon the defendant, to be forced on to trial in the action of trespass, wherein there must be many issues; and consequently, although the justice of the case is with the defendant, he may be liable to costs, by reason of some one of the issues, upon which the merits do not in the least depend, being found against him.

The rule was made absolute.

And

And by *Ryder Ch. J.*—It has been said; that as the making of the present rule absolute will prevent the plaintiff from proceeding in his action, it will stop the course of justice; and that there is no instance of the court's interposing in such case: But the vexatiousness and oppressiveness of the plaintiff in the present action are so very apparent; that whether there be any instance of the court's interposing in such case or not, it is proper to do it in the present case.

Rex vers. The Inhabitants of St. Botolph, Bishopsgate.

A woman's settlement is not suspended by marrying a man who has no settlement in England.

IN an order of sessions it was stated; that *Eleanor* the pauper, whose settlement was in the parish of *St. Botolph Bishopsgate*, married *Finley* an *Irish* sailor; that she resided some time with her husband in the parish of *St. John Wapping*, and upon his going abroad, was left by him there; that her husband has not to her knowledge any settlement in *England*; that she believes her husband to be still living, having very lately received a letter from him; and that the pauper, together with a child which she had by her husband, had been removed to the parish of *St. Botolph*.

One question was, Whether the pauper could be removed to the parish of *St. Botolph*?

It was holden that she might.

And by *Ryder Ch. J.*—The settlement of a person in one parish does always continue, until a settlement is gained in another parish. It is not in the power of a person to determine his right to one settlement, in any other way than

than by the gaining of another; a settlement being a permanent thing, and the publick being interested therein. As the settlement of the pauper before her marriage was in the parish of *St. Botolph*, and as she did not thereby acquire any other settlement, her settlement continues to be in that parish.

During the time that the husband of the pauper cohabited with her in the parish of *St. John*, she could not be removed from that parish to the parish of *St. Botolph*; because her husband could not be removed thither; and a married woman cannot be removed from her husband: But as her husband has now left her, there does not appear to be any reason, why she should not be removed to her own settlement.

It has been said; that the removal of the pauper to the parish of *St. Botolph* will, in effect, be a divorce of her from her husband; for that in case he should return, it will not be lawful for him to cohabit with her in that parish: But this objection is not well founded; for as the husband has no settlement in *England*, it will, in case he should return, be as lawful for him to cohabit with his wife in the parish of *St. Botolph*, as in any other parish.

It has been said; that in the case of *Rex v. The Inhabitants of Norton*, Mich. 23 G. 2. which was a case like the present, it was holden, that the settlement of the wife was suspended during coverture; and it has been said; that the maxim *stare decisis* ought to be adhered to: But four or five antecedent cases have been cited; in which it was holden, that the settlements of the wives did, in cases like the present, continue. The maxim *stare decisis*

cifis is a good general maxim: But it is not always to be adhered to; and it must be allowed; that the court is as well warranted in the present case, to depart from what was holden in the case of *Rex v. The Inhabitants of Norton*, as the court was in that case, to depart from what had been holden in the four or five anteceded cases.

Another question was, Whether the child could be removed to the parish of *St. Botolph*?

It was holden that it might.

And by *Ryder Ch. J.*—If the father of a legitimate child have a settlement in *England*, his settlement is the settlement of the child: But if the father of such child have no settlement in *England*, and the mother have, her settlement is the settlement of the child.

Rex vers. The Inhabitants of Sudbury.

If a certificated person be removed to the parish by which the certificate was given, the certificate is satisfied and at an end.

IN an order of sessions it was stated; that *Thomas Bladen*, together with his wife and the *Pauper* and his son, went in the year 1728 to reside in the parish of *Utoxeter*, under a certificate from the parish of *Sudbury*, addressed to the parish of *Utoxeter*; that in the year 1731, *Thomas Bladen* being dead, and the wife becoming chargeable, she, together with the *Pauper*, was removed to *Sudbury* by an order of two justices; that the certificate was not delivered up; and that the *Pauper* afterwards served an apprenticeship in *Utoxeter*.

The question was, Whether the *Pauper* did gain a settlement in *Utoxeter*?

It was holden that he did.

And

And by *Ryder Ch. J.*—We are of opinion ; that the certificate was satisfied and at an end, by the removal of the wife and the pauper under an order of two justices; and consequently, that the pauper was as capable of gaining a settlement in the parish of *Utoxeter* as in any other parish. If it should be holden, that a certificate is not satisfied and at an end by one removal, under an order of two justices, it would be difficult to say when it is. As the consequence of this uncertainty would be, that parishes would be averse to the giving of certificates; the design of the certificate act would, in a great measure, be frustrated. The case of *Rex v. The Inhabitants of Sowerby*, Hil. 24 G. 2. has been cited, as an authority for the pauper's gaining a settlement in the parish of *Utoxeter*: But, there is a material difference betwixt that and the present case. In that case, the return of the family, to the parish which gave the certificate, was a voluntary act; whereas in the present case, the family was removed, to the parish by which the certificate was given, under an order of two justices.

Easter Term,

28 Geo. 2. 1755.

Sir Dudley Ryder, *Chief Justice.*

Sir Martin Wright,
Sir Thomas Denison, } *Justices.*
Sir Michael Foster,
Sir J. Eardley Wilmot, }

Rex vers. Day.

A new trial
cannot be
granted by an
inferior court.

UPON a rule to shew cause, why an attachment should not be awarded, it appeared; that the defendant was undersheriff of the county of *Cambridge*; and that he had granted a new trial in a cause in the sheriff's court.

The rule was discharged.

And by *Ryder Ch. J.*—In the case of *Hall v. Hill*, *Mich. 1 Ann. Farr.* 85. it is said by *Holt Ch. J.* to be a rare thing for judges to grant a new trial before themselves. In another report of the same case, by the name of the case of the *Mayor and Aldermen of Bristol*, it

it is said to have been holden; that an inferior court cannot grant a new trial. In the case of *Page v. Round*, *Pasch. 10 Ann.* in this court, it was holden; that an inferior court cannot grant a new trial. The same was holden in the case of *Brook v. Ewers and Wife*, *Mich. 5 G. 1.* in this court; and a *mandamus* was awarded for proceeding to judgment upon the verdict. Upon the whole it seems to be a settled point, that a new trial cannot be granted by an inferior court: But, as it does not appear, that the defendant acted either from a corrupt, or from a partial motive, the present rule ought not to be made absolute; in as much as, a judicial officer is not answerable criminally for an error in judgment.

A rule was made to shew cause, why a *mandamus* should not be awarded for proceeding to judgment upon the verdict; which, no cause being shewn, was at another day made absolute.

And by *Wilmot J.*—It has of late years been the practice, to award a *mandamus* for proceeding to judgment, in the room of the writ *de procedendo ad judicium*.

Rex *vers.* Chapman.

UPON a rule to shew cause, why a conviction by a justice of the peace should not be quashed, it appeared; that the conviction was upon the 43 *Eliz. c. 7.* whereby it is enacted, “ that if any person shall rob an
“ orchard, not being felony by the laws of
“ this realm, being thereof convicted by the
“ testimony of one witness upon oath, before
“ one justice of the peace, shall give the party
D d 2 “ such

A conviction quashed; because the offence was not therein particularly described.

“such recompence, as by the said justice shall be ordered;” that it was stated in the conviction, that J. S. made oath before the justice, that the defendant *Martha Chapman* did rob the orchard of *Thomas Whitby*, the robbery not being felony by the laws of this realm; and that thereupon the justice did adjudge the said *Martha Chapman* to be guilty of the said robbery, and did order her to pay ten shillings and six-pence to the said *Thomas Whitby*, by way of recompence.

The rule was made absolute.

And by *Ryder Ch. J.*—It is laid down in 3 *Inst.* 41. that although the words of a statute, by which an offence is described, are general, the description of the offence in an indictment must be particular; for that otherwise, the party indicted will not know what charge he is to defend himself against. The description of the offence in a conviction ought to be quite as particular, or perhaps more so, as in an indictment; because a conviction is a summary proceeding.

These words in the present conviction, *the robbery not being felony by the laws of this realm*, are not a sufficiently particular description of the offence. The manner of the stealing ought to have been stated; that the court might have judged whether it were felonious, and consequently whether the justice had a jurisdiction. If a tree cut down be stolen out of an orchard, this is felony. If a person come into an orchard in the day time, and shake apples from a tree; and afterwards come in the night and take them away, this is felony.

There

There is another reason, why the offence in the present conviction ought to have been described more particularly; namely, that the court might have judged, whether the money ordered to be paid was an adequate recompence to the party injured. In the case of *Regina v. Burnaby*, Lord Raym. 901. a conviction upon this statute was quashed; because it was only stated therein, that the defendant had cut down divers lime-trees; the opinion of the court being, that the number of the lime-trees ought to have been mentioned.

Rex *vers.* Lewis.

UPON a motion for quashing an indictment; the charge in the indictment appeared to be; that the defendant, intending to cheat and defraud J. S. had sold to him eight hundred weight of gum, at the price of seven pounds by the hundred weight; falsely pretending and affirming, that the gum was *gum seneca*, and that it was worth seven pounds by the hundred weight; whereas in truth the gum was not *gum seneca*, but a gum of an inferior kind, and was not worth more than three pounds by the hundred weight.

An indictment for cheating quashed; because no false token was made use of.

As a ground for quashing the indictment, it was said; that as no false token was made use of, an indictment will not lie; and the case of *Regina v. Jones*, Lord Raym. 1013. was cited; in which an indictment for obtaining money upon a false pretence was quashed.

A rule to shew cause was made; which, no cause being shewn, was afterwards made absolute.

Rex

Rex *vers.* Govers.

An indictment will lie for assuming to be a merchant, and producing counterfeit commissions for the buying of goods.

UPON a rule to shew cause, why judgment upon an indictment should not be arrested, the charge in the indictment appeared to be; that the defendant, intending to cheat J. S. did deceitfully take upon himself the stile and character of a merchant, and did deceitfully affirm to J. S. that he was a merchant, and had received divers commissions from *Spain*; and that in order to induce J. S. to believe that he was a merchant and had received such commissions, and to induce J. S. to give him credit, the defendant did deceitfully produce to J. S. several paper writings, which he falsely affirmed to be letters from *Spain*, containing commissions for jewels, watches and other goods, to the amount of four thousand pounds: By means whereof he did get into his hands two watches, the property of J. S. whereas in truth the defendant was not a merchant, and the paper writings containing such commissions were false and counterfeit.

The rule was upon great consideration discharged.

And by *Ryder Ch. J.*—In the case of *Regina v. Maccarty and another*, 6 *Mod.* 301. the pretending to be a merchant was holden to be a false token; and in the case of *Rex v. Munoz*, *Hil.* 13 *G.* 2. the authority of that case, and particularly as to this point, was recognized. The present case is a much stronger than that of *Regina v. Maccarty and another*: in as much as the defendant, besides pretending to be a merchant, did produce several paper writings, which he affirmed to be letters containing commissions to him as a merchant.

Ford

Ford *vers.* Gainer.

UPON a rule to shew cause, why a rule which had been made for changing the *venue* should not be set aside, it appeared; that the motion for changing the *venue* was subsequent to an order of a judge for time to plead.

The *Venue* may be changed after a judge's order for time to plead.

The rule was made absolute.

And by the court—It has been always the practice of this court, to permit a motion for changing the *venue*, at any time before the defendant has pleaded, notwithstanding he has obtained an order from a judge for time to plead; and it would be very unreasonable, that the having obtained such an order should prevent the changing of the *venue*; because it is frequently not possible, by reason that the cause of action arises at a great distance from *London*, to procure an affidavit, upon which a motion can properly be made for changing the *venue*, before the time for pleading is out.

The court of common pleas would not, heretofore, permit a motion for changing the *venue*, after an order had been obtained from a judge for time to plead. But in the case of *Dennis v. Fletcher*, *East.* 15 G. 2. 2 *Barn.* 387. it was holden; that for the time to come, such an order shall not be a bar to a motion for changing the *venue*.

Esplin *vers.* Smollet.

If matter of fact, as well as matter of record be put in issue, the conclusion may be to the country.

AN action of *Scire Facias* being brought upon a recognizance entered into by the defendant, as bail of J. S. the defendant pleaded; that judgment was signed in the original action against J. S. that a writ of *Fieri Facias* was sued out upon the judgment; and that the money due upon the judgment was levied off the goods of J. S. The plaintiff replied; that a writ of *Fieri Facias* was not sued out upon the judgment against J. S. and that the money due upon the judgment was not levied off the goods of J. S. and the replication concluded to the country.

Upon a demurrer to this replication, it was holden to be good.

And by *Ryder* Ch. J.—It has been said; that as the suing out of the writ of *Fieri Facias* was a matter of record, the replication ought not to have concluded to the country: But we are of opinion; that as the levying off the goods, which was a matter of fact, is put in issue by the replication, as well as the suing out of the writ of *Fieri Facias*, the conclusion to the country is proper.

Rex *vers.* The Aldermen and Burgeſſes of the Borough of Heydon.

An absolute rule for a *mandamus*, for proceeding to an election.

UPON a motion for a *mandamus*, for proceeding to the election of a mayor of the borough of *Heydon*, it appeared; that there was no election upon the day appointed by the charter, or upon the day next after the day appointed by charter; and that the office of mayor was vacant.

An

An absolute rule for a *mandamus* was made.
 And by *Denison* J. (*Ryder* Ch. J. being absent)
 it has been generally the practice, in cases like
 the present, to make a rule to shew cause:
 But we are of opinion; that it is not necessary,
 in such cases, to make a rule to shew cause.

Green *vers.* Weston.

IN a case reserved in an action of debt upon
 a bond, it was stated; that the defendant
 was heir at law of *Henry Weston*, and also de-
 visee of some land under the will of the said
Henry Weston; that the bond, upon which the
 action was brought, was entered into by the
 testator *Henry Weston*; that the defendant
 pleaded; that she had sold the devised land
 for the sum of one hundred and sixty-eight
 pounds, being the best price she could get for
 the same, and had applied all the money the
 same was sold for, being one hundred and
 sixty-eight pounds, towards the satisfaction
 of a judgment, signed against her testator
Henry Weston during his life, for the sum of
 three hundred and sixty pounds; that the
 plaintiff replied; that the defendant had not
 applied all the money the devised land was
 sold for towards the satisfaction of the said
 judgment; that at the trial of an issue joined
 upon this replication, it was proved; that
 upon a treaty with *J. S.* for the purchase of
 the devised land, he refused to purchase it,
 unless he could purchase therewith a tile-shed
 erected upon the devised land, which was the
 property of *J. N.* that thereupon the defen-
 dant purchased the tile-shed of *J. N.* for the
 sum of forty-two pounds, and paid for the

The devisee
 of land is
 only to ac-
 count for the
 real value of
 the land de-
 vised.

E e

same

same with her own money ; that she did afterwards, in consideration of the sum of two hundred and ten pounds, convey the devised land, with the appurtenances, of which the tile-shed was parcel, by lease and release to J. S. and gave a receipt for the consideration money upon the back of the release ; and that she had paid the sum of one hundred and sixty-eight pounds towards the satisfaction of the said judgment.

The question was, Whether the plaintiff be entitled to recover ?

It was holden that he is not.

And by *Ryder Ch. J.*—By the 3 *W. & M. c. 14.* upon which statute the present action is grounded, the devisee of land is only to account, to the specialty creditors of his testator, for the value of the devised land. In the present case, the value of the devised land was only one hundred and sixty-eight pounds; the defendant's tile-shed, which was worth forty-two pounds, being sold therewith ; and the whole being sold for no more than two hundred and ten pounds.

It has been said ; that, as it is not mentioned in the release, that any part of the consideration money, was to be paid for the tile-shed, evidence ought not to have been admitted, that any part of the same was received for the tile-shed : But we are of opinion ; that this evidence was admissible. Suppose there had been a mortgage by the testator upon the devised land ; and, after the money due thereupon had been paid off by the devisee, the land had been conveyed by lease and release, he might certainly have given evidence by way of deduction of the payment of this money, although it were not mentioned in the release ; because, as to so much, the money

money received for the devised land would not be assets; and the same reason holds, for admitting the evidence, by way of deduction, that forty-two pounds, parcel of the two hundred and ten pounds, was not received for the devised land.

Rex *vers.* Newsham and Others, Common-Council-Men of the Borough of Carmarthen.

UPON a rule to shew cause, why a *mandamus* should not be awarded for proceeding to the election of a mayor of the borough of *Carmarthen*, it appeared; that by a by-law made in the reign of Queen *Elizabeth*, the right of electing a mayor of the borough was vested in the major part of the common-council-men of the borough; that this right had been ever since that time exercised by the major part of the common-council-men; that upon the day appointed by the charter for the election of a mayor, a mob took possession of the town-hall; that upon the succeeding day, another mob did the same; that upon the latter day *J. S.* was elected mayor by the burgesses at large; that *J. N.* who presided at the election of *J. S.* was not the next person in rank or office to the present mayor, there being, at the time of that election, three other persons nearer in rank or office to the present mayor than *J. N.* that the common-council, which when compleat consists of twenty persons, does at this time consist of only eleven; and consequently, that as not less than eleven common-council-men can elect a mayor, if a mayor be not elected, before one of the present common-council men shall

A *mandamus* for proceeding to an election may be awarded, although there has been an election *de facto*.

happen to die, no person, supposing the right of electing to be in the major part of the common-council, can ever be elected mayor.

One question was, whether a *mandamus* can, in the present case, be awarded?

It was upon great consideration holden, that it may.

And by *Ryder Ch. J.*—It has been said; that this court is only empowered by the 11 G. 1. c. 4. to award a *mandamus*, “where it shall happen, that *no election* of a mayor, or other chief officer of a city, borough or town corporate shall be made upon the day, or within the time appointed by charter or usage for that purpose; and that *no election* of such officer shall be made pursuant to the directions of this statute; or such election being made, shall afterwards become void;” and it is inferred; that as there has been, in the present case, an election *de facto* of a mayor, and that election is not yet determined to be void, the court cannot award a *mandamus* for proceeding to an election of a mayor. But we are of opinion; that the words *no election* in that statute, ought to be construed *no legal election*; and consequently, that although there has been an election *de facto*, the court has a discretionary power, upon considering all the circumstances of the election, to award or not to award a *mandamus*, as the justice of the case may require. If on all the circumstances of an election *de facto*, the legality thereof be doubtful, the court ought not to award a *mandamus*; it being in such case proper, that the legality of the election should be tried in an information in the nature of a *quo warranto*: But if upon all the circumstances of an election *de facto*, it appear clearly to be illegal, the court ought to award
a man-

a *mandamus* ; because it would, in such case, be nugatory, to try the legality of the election in an information in the nature of a *quo warranto*.

Another question was, Whether a *mandamus* ought, in the present case, to be awarded ?

It was holden that it ought.

And by *Ryder Ch. J.*—The court does not mean to give any opinion as to the right of election ; but, in whomsoever that right may be, the election of *J. S.* appears clearly to be illegal. It was in a riotous manner ; and the person, who ought to preside at the election of a mayor, did not preside thereat. The circumstance, that the common-council-men are reduced to the lowest number which can elect a mayor, is likewise of great weight in the present case ; for if the right of election be in the major part of the common-council-men, and any one of the present common-council-men shall happen to die before there is an election of a mayor, there never can be an election ; and consequently, the corporation must be dissolved.

The rule was made absolute : But it was ordered to be therein inserted, that the *mandamus* is to be without prejudice to the right of election ; and that it shall be directed to the common-council-men generally, and not to any one or more of them by name. It was likewise ordered, that the names of two indifferent persons shall be inserted in the rule for the *mandamus* ; by whom six days notice, at the least, shall be given of the day appointed for the election.

Bennet *vers.* Hart.

A writ of enquiry awarded for the assessing of treble damages.

UPON a rule to shew cause, why a writ of enquiry should not be awarded, for assessing the treble damages given by the 43 *Eliz. c. 2.* it appeared; that the action was brought on account of something done by the defendant, as overseer of the poor, by virtue of his office; that there was a verdict for the defendant; that the jury assessed only single damages; that there was no suggestion upon the *postea*; and that the master had refused to allow more than single costs.

The rule was made absolute.

And by the court——It has been said; that as single costs have been taxed, the present application is too late: But we are of opinion; that as the taxing of single costs was not at the desire of the defendant, the court is not precluded by the act of the master, who refused to allow more costs, from awarding a writ of enquiry. As a ground for awarding a writ of enquiry, it is necessary to enter a suggestion upon the *postea*; that the defendant was an overseer of the poor; and that the action was brought against him for something done by virtue of his office.

Rex

Rex *vers.* Lawfon.

UPON a rule to shew cause, why a *mandamus* should not be awarded, for admitting the defendant to the office of clerk of the peace of the county of *Surry*, it appeared; that upon shewing cause to the rule at a former day, a feigned issue was ordered by consent, to try whether the right to the office was in the defendant, or in *J. S.* that the record of the issue was entered by *J. S.* at the office for the county of *Surry*; and that he afterwards withdrew the record.

Further time
for the trying
of a feigned
issue refused.

The question was, Whether further time ought to be allowed to *J. S.* for trying the issue.

It was holden that it ought not.

And by the court—As it does not appear that, there was any good reason for withdrawing the record, no further time ought to be allowed.

Thomlinson *vers.* Brown.

UPON a rule to shew cause, why judgment should not be arrested, it appeared; that the action was an action upon the case; that it was brought by the owner of the inheritance in a house against his own lessee, for stopping up divers windows of the house.

An action will
lie for the
owner of the
inheritance in
a house for
stopping up
windows.

The rule was discharged.

And

And by the court—It has been said; that as the nuisance to the house, by stopping up divers windows, may be abated, before the defendant's term is expired, the plaintiff cannot at present maintain an action against his own lessee for stopping them up: But we are of opinion; that the plaintiff may at present maintain an action for the injury to his inheritance, by obstructing the ingress of light and air into the house; and that this action does as well lie against the plaintiff's own lessee, as against any other person.

Baines vers. Blackbourne.

The pendency of a prior action cannot be pleaded in abatement.

IN an action of debt, brought for the exercise of a trade contrary to the 5 *Eliz. c. 4.* the defendant pleaded in abatement; that a prior action was depending for the same matter.

Upon a demurrer to this plea, it was holden to be bad.

And by the court—The pendency of a prior action for the same matter may be pleaded in bar to a second action: But it cannot be pleaded in abatement.

Rex vers. The Justices of the Peace for the Town of Nottingham.

An information against justices of the peace for refusing to grant licenses.

UPON a rule to shew cause, why an information for a misdemeanor should not be filed, it appeared; that the defendants, who were justices of the peace for the town of *Nottingham*, had refused to grant licenses for twenty publick houses in that town; that

that licences had for some years past been granted to the occupiers of these houses; and that the occupiers of these houses and the defendants had, at a contested election for that town, a short time before the time for licensing publick houses, had for different candidates.

The rule was made absolute.

And by *Ryder Ch. J.*—It has been truly said; that the power of licensing publick houses is so absolutely in the discretion of the justices of the peace, that this court will never award a *mandamus* for the licensing of a publick house: But it is equally true; that the abuse of a discretionary power ought to be more severely punished than the abuse of a power which is not discretionary. In the present case it appears manifestly, that the power of licensing publick houses was very grossly abused; for it is not probable, that the occupiers of twenty publick houses should all have so misbehaved themselves at the same time, as to make it improper to grant them licences.

Uppendale *vers.* Lightfoot.

UPON a writ of error, the error assigned was; that the plaintiff in the original action had prosecuted his suit in person, and not by attorney.

A plaintiff may prosecute his suit in person.

The judgment was affirmed.

And by the court—It is lawful for the plaintiff in an action, to prosecute his suit in person.

Rex *vers.* Laurence.

An affidavit ought not to be entitled, unless there be some cause depending in the court.

UPON a rule to shew cause, why an information for a misdemeanor, should not be filed, it appeared; that the affidavit, upon reading of which the rule was made, was entitled *Rex v. Laurence*.

The rule was discharged.

And by the court—The affidavit whereupon the motion for this rule was made, ought not to have had any title; because, until the rule was made, there was no cause, under the name of *Rex v. Laurence*, depending in the court.

Hussey *vers.* Welby.

A *Scire Facias* upon a judgment may be sued out by a new attorney without the leave of the court.

UPON a rule to shew cause, why the proceedings upon a *Scire Facias* should not be set aside for irregularity, it appeared; that the *Scire Facias*, which was brought upon a judgment, was not sued out by the attorney, who had been concerned in the original action; that the leave of the court had not been obtained for changing the attorney; and that no notice had been given of the attorney being changed.

The rule was discharged.

And by the court—If the attorney retained in a cause be changed during the cause, without the leave of the court, or if notice be not given that the attorney is changed, the subsequent proceedings are irregular: But as a *Scire Facias* upon a judgment is a new action, in which there ought to be a new retainer,

tainer, the *Scire Facias* may be sued out by a new attorney, without the leave of the court for changing the attorney, or giving notice that he is changed.

Williams *vers.* Williams.

UPON a motion to stay the proceeding in an action, upon the ground of the action's being below the dignity of the court, an affidavit was offered; in which it was alleged; that no more than the sum of five shillings and eight pence was due to the plaintiff.

An affidavit that only a small sum of money is due, was not permitted to be read.

No rule was made; the affidavit not being permitted to be read.

Trinity Term,

28 & 29 Geo. 2. 1755.

Sir Dudley Ryder, *Chief Justice.*

Sir Thomas Denison, }
Sir Michael Foster, } *Justices.*
Sir J. Eardley Wilmot, }

Goddard *vers.* Law.

If that which is contained under a *feigned* be repugnant, it may be rejected.

IN an action of *assumpsit*, the defendant, an executor, pleaded; that at the time of exhibiting the plaintiff's bill, he had fully administered.

The plaintiff replied; that at the time of exhibiting his bill; to wit, *eight days before*, the defendant had assets in his hands.

Upon a demurrer to this replication, it was holden to be good.

And by *Ryder Ch. J.*—It has been said; that if issue be joined upon the replication, the defendant will not be allowed to give evidence of any money paid by him within the eight days

days preceding the time of exhibiting the plaintiff's bill: But we are of opinion, that he may give such evidence: that the words *eight days before*, which are contained under a *scilicet*, and are repugnant to the positive allegation in the replication, ought not to be regarded.

Doley *vers.* Pitstow.

AN action of debt being brought upon a bond, and Oyer being prayed of the bond, the condition appeared to be; that the defendant shall perform the award of *A. B.* and *C. D.* so as an award be made by them, on or before the thirteenth day of *March* then next ensuing; otherwise, that the defendant shall perform the umpirage of such person as shall be chosen umpire by the said *A. B.* and *C. D.* so as the umpire shall make an umpirage, on or before the seventeenth day of the said *March*.

An umpirage is good, although it be made by an umpire, chosen before the time for making an award is expired.

The defendant pleaded; that *A. B.* and *C. D.* did not make an award on or before the said thirteenth day of *March*; and that no person was chosen umpire by them, after the said thirteenth day of *March*.

The plaintiff replied; that before the said thirteenth day of *March*, to wit, upon the eleventh day of that month, *E. F.* was chosen umpire by the said *A. B.* and *C. D.* and that an umpirage was made by the said *E. F.* on or before the said seventeenth day of *March*.

Upon a demurrer to this replication, the question was, whether the arbitrators could choose an umpire, before the time allowed for their making an award was expired.

It

It was upon great consideration holden that they might.

And by *Ryder* Ch. J.—The case of *Reynolds v. Gray*, *Salk.* 70. has been cited and relied upon; in which it was said by *Holt* Ch. J. that arbitrators cannot choose an umpire, until the time allowed for their making an award is expired. It does not appear from the report of that case in *Salkeld*, or from another report thereof in Lord *Raymond* 222. whether there were any words in the rule of court, by which the arbitrators were appointed, to restrain them from choosing an umpire, until the time allowed for making an award is expired. If there were such words in the rule, that case is of no authority in the present case, wherein the arbitrators are not so restrained. If there were not such words in the rule, we are of opinion; that the case is not law. In the case of *Jennings v. Vandeputt*, *Cro. Car.* 263. it is laid down; that arbitrators may choose an umpire before the time allowed for their making an award is expired; and that an umpirage made by the umpire, so chosen is good, in case the arbitrators do not make an award within that time. The same is laid down in the case of *Watson v. Mitchell*, 1 *Roll. Abr.* 262. and in that of *Elliot v. Cheval*, 1 *Lutw.* 41. In the case of *Cordwell v. Mackarell*, *Trin.* 17 G. 2. in this court, the authority of these cases was recognized; and it was therein holden; that an umpirage made during the time allowed for making an award is good, in case the arbitrators do not make an award within the time.

Sir

Sir Joseph Hankey and Company *vers.*
Wilson.

UPON a rule to shew cause, why a new trial should not be had in an action of *assumpsit*, it appeared; that the action was brought by the plaintiffs, as indorsees of a bill of exchange; that the defendant had accepted the bill; that there was no actual proof, that the name of one of the indorsors of the bill is of his hand-writing; that the name of that indorser, and the names of all the other indorsors were upon the bill at the time of its being accepted; that at the time of his accepting it, the defendant promised to pay the bill; and that upon this evidence, which was left by *Ryder Ch. J.* to the jury, a verdict was found for the plaintiffs.

Actual proof, that the name of an indorser is of his hand-writing, is not always necessary.

The question was, Whether upon this evidence the matter ought to have been left to the jury?

It was holden that it ought.

And by the court—It is in the general necessary, to give actual proof, that the name of every indorser is of his hand-writing: But it is not necessary to do this in every case. In the present case, it was a matter proper for the determination of the jury, whether the acceptance of the bill, when all the indorsors names were upon it, together with the promise to pay, did not amount to an admission, that the name of every indorser is of his hand-writing; in as much as, such an admission would supersede the necessity of actual proof, that the name of any indorser is of his hand-writing.

Brenan

Brenan *vers.* Currint.

If there be a special agreement, the general right of detaining a thing delivered is thereby waved.

IN a case reserved, in an action of *Trover*, it was stated; that an agreement was entered into by the plaintiff and the defendant, whereby the sum of ten shillings and sixpence was to be paid to the defendant, a farrier, for curing the plaintiff's mare of a distemper, as soon as she should be cured, and likewise a reasonable sum of money for keeping the mare, until she should be cured; that in pursuance of this agreement, the mare was delivered to the defendant; that after the mare was cured, the plaintiff tendered the sum of ten shillings and sixpence to the defendant for the cure, and at the same time demanded the mare; that the defendant refused to deliver the mare, unless the plaintiff would pay a gross sum of money for the cure and keeping of the mare; and that the action was brought for the conversion of the mare.

The question was, whether the defendant had a right to detain the mare?

It was holden that he had not.

And by *Ryder* Ch. J.—As the sum of ten shillings and sixpence, the sum agreed to be paid for the cure, was tendered to the defendant, he certainly had not a right to detain the mare on account of the cure.

It has been said; that a farrier has a right to detain a beast delivered to him to be cured, until the money due for keeping the beast is paid or tendered: But it is not necessary to give any opinion upon this point; for altho' we should be of opinion, that a farrier has,

in the general, such a right ; yet it would be clear, that the defendant had not in the present case a right to detain the mare ; because his general right to do this, in case he had such a right, was waved by the special agreement, that a reasonable sum of money was to be paid to him for keeping the mare, until she should be cured.

Rex vers. Bathurst.

IN an indictment for a forcible entry, it was charged in the first count ; that the defendant did unlawfully and injuriously, with force and arms, and with a strong hand, enter into a messuage in the peaceable possession of the prosecutor, against the form of the statute. In the second Count it was charged ; that the defendant did unlawfully and injuriously, with force and arms, enter into the dwelling house of the prosecutor.

If any count in an indictment be good, the indictment is good.

Upon a demurrer to this indictment, one question was, whether the first count be good?

The justices were all of opinion ; that this count is not good upon the statute, because it is not therein shewn, what estate the prosecutor had in the messuage ; for he might be only tenant at will, and if he were so, a forcible entry upon the messuage is not an offence against the statute.

Ryder Ch. J. and *Foster* J. were of opinion ; that although the first count be not good upon the statute, it is, notwithstanding the conclusion thereof, good at the common law : And *Foster* J. mentioned the case of *Page v. Harwood*, All. 42. in which it was holden ; that, notwith-

G g

standing

standing the offence charged in an Indictment be not an offence against a statute, and the conclusion of the indictment be against the form of the statute, the person indicted may be found guilty of an offence at the common law, in case the offence charged be an offence at the common law. He added; that forcible entry is an offence at the common law, and not one created by the statute; for that the statute does only, by ordering possession to be restored, give a more speedy remedy.

Denison J. admitted; that a count in an indictment may, in some cases, be good at the common law, although the conclusion thereof be against the form of the statute: But as the entry is charged in the first count in the present indictment to be into a messuage, and to be with a strong hand, which words are contained in the statute against forcible entry, he doubted whether that count, as it appears to be a count upon the statute, be good at the common law. He added; that in 2 *H. H. Pl. C.* it is laid down; that if a person be indicted upon a statute, and the charge in the indictment do not bring him within the statute, he shall not be put to answer upon this indictment for an offence at the common law.

Wilmot J. gave no opinion upon this question.

Another question was, Whether the second count be good?

It was holden that it is.

And by *Ryder Ch. J.*—It has been said; that as the entry is not charged in this count to be with a strong hand, as well as with force and arms, there is not a charge of actual force;
in

in as much as, the words force and arms which are contained in the declaration in every action of *trespass*, do not necessarily imply actual force. As the words with a strong hand are contained in the statute, it is necessary that these words should be contained in an indictment upon the statute: But it is not necessary, that these words should be contained in an indictment at the common law for a forcible entry. The words force and arms, in an indictment at the common law for a forcible entry, do always mean actual force; and if issue had been joined in this indictment upon the plea of not guilty, actual force must have been proved, or the defendant could not have been found guilty upon the second count; an entry without actual force being no more than a trespass.

It is alledged in this count; that the defendant had not a right of entry into the prosecutor's dwelling-house; and the defendant by demurring has admitted that he had not: But if he had, his obtaining possession thereof by force was tortious; and it would be extremely hard, that the prosecutor, who had been tortiously deprived of the possession of his dwelling house, should, in order to recover it, be forced to submit to the trouble, expence and delay of an ejectment.

It is material; that the entry is in this count charged to be into a dwelling house; for a dwelling house is of great regard in the eye of the common law. A dwelling house is called a man's castle; and upon the idea of its being so, it is lawful for him to assemble persons to assist in the defence thereof. The offence of burglary at the common law cannot be committed, unless the house broken and entered

were a dwelling house. It is in the general unlawful, to break open the door of a dwelling house; although it be done to execute the process of the law.

As we are all of opinion; that the second count is good, it would be to no purpose, to let this case stand over for consideration as to the first count; for whatever might be the ultimate opinion of the court as to that count, there must, as one count is good, be judgment for the king.

Rex vers. The Inhabitants of Horsley.

The son of a certificated man may gain a settlement, by a hiring and service in a third parish.

IN an order of sessions it was stated; that the *Pauper* was born in the parish of *Hollingsclough*, whilst his father resided there under a certificate from the parish officers of *Horsley*, addressed to the parish officers of *Hollingsclough*; that at the age of twelve years he was hired for a year in the parish of *Peck*, and served the year.

The question was, Whether the *Pauper* did gain a settlement in the parish of *Peck*?

It was holden, that he did.

And by the court—The case of *Rex v. The Inhabitants of Silton*, Hil. 21 G. 2. is almost in point. It was in that case holden; that the son of a certificated man, who was born in the parish of *Wincanton*, during his father's residence there under a certificate from the parish officers of *Silton*, addressed to the parish officers of *Wincanton*, gained a settlement by serving as an apprentice in the parish of *Horfington*.

Rex

Rex *vers.* Hanson.

UPON a motion to quash an indictment for a cheat, it appeared; that the defendant, intending to deceive and defraud *J. S.* pretended and affirmed to him, that she was a single woman, and that her name was *Fuller*; by means whereof she obtained credit from *J. S.* for board and lodging to the amount of three pounds; whereas she was in truth a married woman, and the wife of a poor labouring man of the name of *Hanson*.

A rule to shew cause was refused.

And by *Ryder Ch J.*—We are inclined to be of opinion; that the indictment is good: But it is not necessary to give a positive opinion as to that; for unless an indictment be clearly bad, which the indictment in the present case certainly is not, the court will not quash it.

Rex *vers.* Nichols and Another.

A *Mandamus* having been awarded, whereby the defendants, who were justices of the peace, were commanded to appoint overseers of the poor for *Walsal Foreign*, the return was; that *Walsal Foreign* is not a distinct division from *Walsal Borough*.

The costs, incurred before a feigned issue was ordered, ought not to be paid.

A rule was afterwards made, to shew cause, why an information should not be filed against the defendants for a false return.

Upon

Upon shewing cause to this rule, a feigned issue was with consent ordered, to try whether *Walsal Foreign* be a distinct division from *Walsal Borough*; and it was inserted in the rule for the feigned issue, that costs shall abide the event of the trial.

It being found by a verdict, that *Walsal Foreign* is a distinct division from *Walsal Borough*, and a peremptory *Mandamus* being awarded; the question was, Whether the defendants ought to pay the costs of the rule for the information, which were incurred by the prosecutor before the feigned issue was ordered?

It was holden, that they ought not.

And by *Ryder Ch. J.*—It has been said; that if the rule for the information had been made absolute, and there had been a verdict against the defendants, the court, unless they would have consented to go before the master, would, as has in some cases been done, have set a fine so large, that the third part thereof might have been sufficient to reimburse the prosecutor his costs, or at least a considerable part thereof; and it has been inferred; that as the question would have been the same upon the information, as it was upon the feigned issue, the costs of the rule for the information ought to be paid. But all this proceeds upon a mistake; for as the question in the information would in effect, have been a question concerning a civil right; namely, whether *Walsal Foreign* ought to have separate overseers: The court, although there had been a verdict against the defendants, and they had refused to go before the master, would not have set a large fine.

We

We do moreover desire to have it understood; that, whatever may have been heretofore done, the court will not for the time to come set a larger fine, in any case of a conviction upon an indictment, than the nature of the offence does require; although the person convicted refuses to go before the master.

Rex vers. The Inhabitants of High and Low Bishopside.

IN an order of sessions it was stated; that *Jonathan Joye* resided some years in the parish of *High and Low Bishopside*, under a certificate from the parish officers of *Merrwith cum Darley*, addressed to the parish officers of *High and Low Bishopside*; that during his residence under the certificate, he purchased a house in the parish of *Dacre cum Buerley* for the sum of ten pounds, and went to dwell therein; that upon his going to dwell in this house, he carried the certificate, under which he had resided in the parish of *High and Low Bishopside*, and delivered it to the parish officers of *Dacre cum Buerley*; and that the *Pauper* served an apprenticeship with *Jonathan Joye*, whilst he dwelt in the parish of *Dacre cum Buerley*.

Only the parish, to which a certificate is addressed, can avail itself thereof.

The question was, Whether the *Pauper* did gain a settlement in the parish of *Dacre cum Buerley*?

It was holden that he did.

And by *Ryder Ch. J.*—No parish is by the 8 & 9 *W. 3. c. 30.* obliged to receive a person under a certificate, unless the certificate be addressed to its officers; and consequently, no parish,

parish, except the parish to the officers of which a certificate is addressed, can avail itself of the certificate. The delivering of the certificate to the parish officers of *Dacre cum Buerley*, besides being nugatory, was quite unnecessary; in as much as *Jonathan Joye* had a right to dwell in the house he had bought without a Certificate. It may be inferred, from the 2 *Ann. c. 18.* by which it is provided, that an apprentice to a certificated man shall not gain a settlement in the parish, to the officers of which the certificate is addressed, that such an apprentice may gain a settlement in any other parish.

Ashworth vers. Lord.

If there be a covenant to pay one of two things, it is not necessary to make an Election which shall be paid.

UPON a rule to shew cause, why judgment should not be arrested in an action of covenant, it appeared; that the action was brought upon a covenant in a lease, under which the defendant was bound to pay annually to the Plaintiff two hens, or in lieu thereof one shilling, at the election of the plaintiff; and the breach assigned was, that the defendant did not pay either the two hens or the shilling.

The rule was discharged.

And by *Ryder Ch. J.*—It has been said; that the plaintiff ought not to have judgment, because it is not alledged in the declaration, that he had made an election. If the breach assigned were, that the defendant did not pay one of the two shillings, the plaintiff must have alledged, that he had made an election to have that thing paid: But as the breach assigned is, that the defendant did not pay either of the two shillings, it was not necessary for the plaintiff to alledge, that he had made an election.

Rex

Rex vers. Roch.

THE defendant, who had been convicted upon an indictment for an assault, being brought up for judgment, an affidavit was offered, in order to mitigate the punishment, in which it was alledged; that previously to the assault, the prosecutor had very much provoked the defendant: But it did not appear; that any evidence was given of this at the trial.

An affidavit, as to a matter of which no evidence was given at the trial, was not permitted to be read.

The court would not permit the affidavit to be read.

And by *Ryder Ch. J.*—If there were such provocation, evidence ought to have been given of it at the trial; that being the proper time for the defendant to have availed himself thereof.

Green vers. Hassel.

AN attorney had delivered two separate bills; one of which was for fees and disbursements in causes, the other for making conveyances.

An attorney's bill for making conveyances may be taxed.

Upon a motion that both bills might be referred to be taxed, the case of *Dalston v. Hartcliffe* was cited; in which the Court of Chancery ordered one bill of a solicitor for fees and disbursements in causes, and another for making conveyances to be taxed.

A rule was made to shew cause, which, no cause being shewn, was afterwards made absolute.

H h

Clark-

Clark *vers.* Glasf.

If a traverse be to the whole matter pleaded, it must conclude to the country.

IN an action of debt upon a bond, the defendant pleaded; that the bond was executed by him through force and restraint of Imprisonment.

The plaintiff replied; that the defendant executed the bond of his own free will; without this, that he executed it through force and restraint of imprisonment, and concluded with an averment.

Upon a demurrer to this replication, the question was, Whether the conclusion, be good?

It was holden, that it is not.

And by *Ryder Ch. J.*—The true distinction as to this point is, in our opinion, taken in the case of *Haywood v. Davis and Another, Farr. 105.* namely, that if a traverse be only to a particular fact of the plea, it must conclude with an averment: But if to the whole plea, it must conclude to the country. In the present case, the traverse is to the whole of the plea; and consequently, the conclusion ought to have been to the country.

Cope *vers.* Marshall.

An amendment, alleging a new right of action, refused.

UPON a rule to shew cause, why the declaration in an action of *trespass* should not be amended, by adding the words, *and free Chase,*

Chafe, after the Words *free Warren*, it appeared; that the plaintiff had alledged, that the defendant broke and entered his free warren; and that the action had been commenced more than two terms.

The rule was discharged.

And by the court—By the amendment intended a new right of action would be alledged; a free chafe being quite a different thing from a free warren. It is likewise probable, that the defendant, if the amendment shall be permitted, will be rendered incapable of making any defence. As the declaration now stands, he may prescribe for a right of common in the free warren; because a right of free warren must always be founded upon a grant: But, as a right of free chafe can only be acquired by prescription, the defendant will not be able to prescribe for a right of common in the free chafe; it being a rule of law, that one prescriptive right cannot be set up against another. The case of *Bearcroft v. The Hundreds of Burnhan and Stone*, 3 Lev. 347. has been cited; in which, after the plaintiff had alledged in his declaration a robbery of himself, leave was given to amend, by alledging that the robbery was of a servant. The case of *the Executors of the Duke of Marlborough v. Widmore*, Hil. 4 G. 2. in this court, has likewise been cited; in which, after the plaintiffs had alledged in their declaration a promise to their testator, leave was given to amend, by alledging a promise to themselves. But the amendments in both these cases, were allowed upon the very particular circumstances of the cases. In the former case, which was an action upon the statute of Hue and Cry, the time for bringing

a new action was expired. In the latter case, which was an action of *Assumpsit*, as the defendant had pleaded the statute of limitations, the plaintiffs must not only have failed in that action, unless leave had been given to amend: But it would have been too late to bring a new action; six years being elapsed since the promise was made to themselves. In the present case, the plaintiff may discontinue and bring a new action; and consequently there is no necessity to depart from a general rule of law; namely, that an amendment, by which a new right of action would be alledged, ought not to be permitted. The giving leave to amend in the present case would, moreover, be contrary to another general rule of law; which is, that such an amendment as amounts to the adding of a new count, which the amendment intended certainly does, ought not to be permitted, after the action has been commenced two terms.

Doe on the Demise of Barnard and Fenton *vers.* Reason.

A remainder, limited by a will to a person *in Fee*, does always vest *eo instante* the testator dies.

IN an action of Ejectment, it was found by a special verdict; that *Edward Brogden*, being seised in fee of the premises in question, devised them in the following words: "I give and devise all my messuages in *Leeds* to my wife *Elizabeth*, for the term of her natural life, without impeachment of waste; and after her decease, I give and devise the same to *Elizabeth Croson* my niece, for her natural life, without impeachment of waste; and immediately after her decease, I give and devise the same to such issue of the body of my said niece, as shall be then living; and

" to

“ to the heirs of such issue; that is to say, in
“ case there shall be only such issue one child,
“ then I give the whole to that one child and
“ its heirs; and if there shall be issue two or
“ more children, then to such two or more
“ children equally amongst them, share and
“ share alike, and the heirs and assigns of
“ such two or more children, to take both
“ freehold and inheritance as tenants in com-
“ mon, and not as joint tenants; and in case
“ my said niece shall die without issue of her
“ body then living; or in case all such issue
“ shall die without issue, so that all and every
“ the descendants of her body shall be dead
“ without issue, then, and not before, I give
“ and devise all the aforesaid premises to my
“ cousins *Thomas Barnard* and *James Fenton*,
“ their heirs and assigns for ever.”

It was likewise found that upon the testator's death in the year 1744, his wife entered; that upon her death in the year 1750, *Elizabeth Croson* entered; that she afterwards intermarried with the defendant; that in *Trinity Term* 1751, the defendant and his wife suffered a common recovery, and declared the uses thereof to themselves for life, with remainder to the defendant in fee; that the defendant's wife died in *October* 1752; that she never had any issue of her body; that *James Fenton*, one of the lessors of the plaintiff, is one of the devisees of *Edward Brogden*; and that *Thomas Barnard*, the other lessor of the plaintiff, is the eldest son and heir of the other devisee *Thomas Barnard*.

The question was, Whether the lessors of the plaintiff ought to recover?

It was holden, upon great consideration, that they ought.

And

And by *Ryder Ch. J.*—It has been said ; that the devise to *Thomas Barnard* and *James Fenton* may take effect, by way of executory devise : But we are of opinion, that as it may take effect by way of remainder, it cannot take effect by way of executory devise. In the case of *Purefoy v. Rogers*, 2 *Saund.* 388. it was holden ; that wherever a remainder is limited upon an estate of freehold, which is capable of supporting a remainder, the limitation shall never be deemed an executory devise.

It has been said ; that an estate in fee is devised to the issue of *Elizabeth Croson*. If this were so, the devise to *Thomas Barnard* and *James Fenton* would certainly be void ; because no estate can be limited upon a fee : But we are of opinion ; that only an estate tail is devised. An estate in fee would certainly have passed, by the words in the former part of this will, to the issue of *Elizabeth Croson* : But it appears from subsequent words, to be the manifest intention of the testator, that the issue should only take an estate tail ; and it is a settled rule in the construction of a will, that the meaning of former words therein contained may be restrained by subsequent words.

It has been said ; that the remainder devised to *Thomas Barnard* and *James Fenton* was contingent ; because its taking effect depended upon the contingency of *Elizabeth Croson's* dying without issue : But we are of opinion ; that it was a vested remainder, and consequently, that it is not barred by the recovery. If a remainder be limited by a will to a person *in Esse* at the time of the testator's death, it does always vest *eo instante* the testator dies ; although a contingent remainder, which, if the contingency

Contingency whereupon it depends had happened, would be antecedent thereto, be limited by the same will. In the present case, the remainder to *Thomas Barnard* and *James Fenton* did vest at the time of *Edward Brogden's* death; although the remainder to the issue of *Elizabeth Croson* could not vest; because there was not at that time any child of *Elizabeth Croson*. The remainder to *Thomas Barnard* and *James Fenton*, in case a child had, after the death of *Edward Brogden*, been born of the body of *Elizabeth Croson*, would have opened, in order to let in the remainder that child: But it would nevertheless have continued to be a vested remainder, and upon the event of the child's dying without issue would have shut again.

Rex vers. Powell.

UPON a rule to shew cause, why an information in the nature of a *quo warranto* should not be filed, it appeared; that the information was moved for on account of the defendant's having executed the franchise of a freeman of a corporation; and that the defendant had surrendered the franchise before the rule was made to shew cause.

An information for the Usurpation of a franchise may be filed, although the franchise is surrendered.

The rule was made absolute.

And by the court—It does not appear clearly, that the franchise was surrendered in the proper manner: But if it were, the defendant, in case he had not a right thereto, ought to be punished for the usurpation. It is necessary that there should be, in a case like the present, a disclaimer upon record. If there be not, no punishment can be inflicted upon the person who has usurped the franchise; for the court cannot

cannot set a fine for the usurpation, unless there is such a disclaimer.

Perry vers. Nicholson.

An award, by which costs are awarded generally, is good.

UPON a rule to shew cause, why an award should not be set aside, it appeared; that costs were awarded; and that the sum to be paid for costs was not ascertained.

The rule was discharged.

And by *Ryder Ch. J.*—It has been said; that as the sum to be paid for costs is not ascertained, the award is bad for uncertainty: But the award is not bad on that account; for the sum to be paid may be ascertained by the officer of the court, whose province it is to tax costs. In the case of *Furnis v. Hallom*, 2 *Barn.* 140. it was holden by the court of Common Pleas, in a case like the present, that the costs might be taxed by one of the Prothonotaries.

Mitchell vers. Robinson.

A rule for staying the proceedings in an action, upon the payment of what is due. Refused.

A Motion being made to stay the proceedings in an action, upon the ground of the action's being below the dignity of the court, an affidavit was offered, it which it was alledged; that the sum of forty shilling is not due to the plaintiff; and it was said, that in the court of Exchequer the proceedings in actions have been frequently staid upon such affidavits.

A rule to shew cause, why the proceedings should not be staid, was refused; the affidavit not being permitted to be read.

And

And by *Denison J* — This court has always objected to the reading of such an affidavit: But the matter has been sometimes referred to the Master.

An absolute rule was made, for referring it to the master, to see what is due to the plaintiff; and that upon the payment of what is due, with the costs of the action and of this application, the proceedings shall be staid.

Rex vers. Davies.

A Motion was made upon the last day of this term, for a rule to shew cause, why an information in the nature of a *quo warranto* should not be filed. An information is not to be moved for upon the last day of a term.

The court, upon being informed by the secondary of the Crown Office, that by the practice of court such a rule ought not to be moved for upon the last day of a term, refused to make a rule to shew cause.

But *Denison J.* inclined to be of opinion; that the practice of not moving upon the last day of a term, for a rule to shew cause why an information should not be filed, is confined to an information for a misdemeanor, and does not extend to an information in the nature of a *quo warranto*.

Michaelmas Term,

29 Geo. 2. 1755.

Sir Dudley Ryder,	<i>Chief Justice.</i>
Sir Thomas Denison,	} <i>Justices.</i>
Sir Michael Foster,	
Sir John Eardley Wilmot,	

Rex vers. Lediard.

An information filed against a justice of the peace, for improperly discharging a prisoner.

UPON a rule to shew cause, why an information for a misdemeanor should not be filed, it appeared; that J. S. had been committed to prison by a justice of the peace, for seducing seven workmen in the manufacture of glass to go out of this kingdom into a foreign country; that the defendant, who was also a justice of the peace, had discharged J. S. upon a recognizance being entered into for his appearance, by which he was himself bound in the sum of one thousand pounds, and two other persons in the sum of five hundred pounds each; that the two persons were, in fact, worth nothing; and that J. S. immediately after his discharge, went out of the kingdom.

The

The rule was made absolute.

And by *Ryder Ch. J.*—It has been said; that the defendant might be ignorant of the poverty of the two persons who entered into the recognizance; But it was his duty, before he discharged the prisoner, to have made a strict enquiry as to their circumstances. Besides the defendant's failing in this, the sum in which the recognizance was entered into, is much too small; the punishment, inflicted in such case by the 23 G. 2. c. 13. being a penalty of five hundred pounds, and twelve months imprisonment, for every workman seduced.

Drummond and Catharine his wife, administrators of *Ashe vers.* The Duke of Bolton.

AN action of debt being brought upon a bond, in the penalty of six thousand pounds, and *Oyer* being prayed of the bond, the condition, after reciting that a marriage was intended to be had, between the plaintiff *Catharine* daughter to the defendant, who was at that time Lord *Harry Paulet*, and *William Ashe*, appeared to be; that if the defendant shall pay or secure to the said *Catharine*, or to her children by the said *William Ashe*, three thousand pounds, within six months after the defendant shall become Duke of *Bolton*, then the obligation to be void.

The penalty of a bond is not saved, although one part of a disjunctive condition cannot be performed.

The defendant pleaded; that *William Ashe* died without leaving any child born of the body of the plaintiff *Catharine*, before the defendant became Duke of *Bolton*; and that the plaintiff *Catharine* was not with child at the time of the death of the said *William Ashe*.

I i 2

Upon

Upon a demurrer to this plea, it was holden to be bad.

And by the court—*Laughter's* case, 5th Rep. 22. has been cited and relied upon; in which it is laid down, that if the condition of a bond, consisting of two parts, be in the disjunctive, and the performance of one part, which, as well as the performance of the other part, was possible at the time of entering into the bond, be rendered impossible by the act of God, the penalty is saved: But we are of opinion; that this doctrine, which does not appear to be laid down by the court, but to be the reason given by the reporter for the judgment of the court, is laid down too largely. It is a general rule, that the intention of the parties is to be regarded in the construction of a deed; and it seems very reasonable, that this rule should be observed in construing the condition of a bond. If the plaintiff *Catharine*, at the time the defendant became Duke of *Bolton*, had one or more children by *William Ashe*, it would, perhaps, have been in the defendant's power, to pay the three thousand pounds to her, or to the child or children: But it never could be the intention of the parties, that the money should not be paid to the plaintiff *Catharine*, in case she should not have a child by *William Ashe*, at the time the defendant should become Duke of *Bolton*. The consequence of adhering to the doctrine of *Laughter's* case would be, that in case the plaintiff *Catharine* had been dead at the time the defendant became Duke of *Bolton*, and several children of hers by *William Ashe* had been at that time living, those children would not have been entitled to the money.

Coupland

Coupland *vers.* Frinbow.

UPON a writ of *error*, brought upon a judgment of the court of Common Pleas by default, the error assigned was ; that the writ of *enquiry*, which was returnable upon a general return day, ought to have been returnable upon a day certain ; the action, which was against an attorney, being commenced by bill, and not by original.

A writ of *enquiry* in an action by bill is good, although it be returnable upon a general return day.

The judgment was affirmed.

And by the court—In the case of *Launder v. Cripps*, Hil. 6 G. 2. in this court, wherein the same matter was assigned for error as is done in the present case, it was holden to be only a miscontinuance, and that it is cured by the statutes of *Jeofails*.

Rex *vers.* Ponsonby and Eight Others.

UPON a writ of *error*, brought upon a judgment of the court of King's Bench in *Ireland*, it appeared ; that in an information filed in the court of King's Bench in *Ireland*, it was charged ; that the defendants had usurped the franchises of free Burgeses of the corporation of *Newtown* in *Ireland* ; that the plea of the defendant *Ponsonby* and one other of the defendants was, that they were duly elected free burgeses, but that they have neither been sworn free Burgeses, nor have executed the franchises ; and they traversed the usurpation ; that the plea of the other seven was, that they were duly elected free burgeses and sworn, and they likewise traversed the usurpation ; that the replication,

A judgment of *ouster* cannot be given at the common law, in an information in the nature of a *quæ warrant*.

replication as to the plea of the two defendants was, that due notice has been given them of their being elected free burgesses, and that they have neglected to be sworn; and as to the plea of the other seven, that by non-residence, and neglect of attending and doing their duty as free burgesses, they have forfeited their franchises, and have ceased to be free burgesses; that the rejoinder by the two defendants was, that due notice has not been given them of their being elected free burgesses; and by the other seven, that at all times since their being elected and sworn free burgesses, when they were duly summoned, and had no lawful excuse to be absent, they have attended and done their duty as free burgesses; that upon a general demurrer, there was judgment against all the defendants; and that part of the judgment was, that the defendants shall be ousted of their franchises.

The judgment was, upon great consideration, reversed.

And by *Ryder Ch. J.*—The ancient method, of proceeding against the usurper of a franchise in a corporation, was by writ of *quo warranto*: But this has been long discontinued, and instead thereof, the proceeding has been by information in the nature of a *quo warranto*. By the 9 *Ann. c. 20.* it is enacted, “That in case any
“ person, against whom an information in the
“ nature of a *quo warranto*, shall be filed, shall
“ be found, or adjudged guilty of an usurpa-
“ tion or intrusion into, or of unlawfully hold-
“ ing and executing the franchise of burgess
“ of a corporation, it shall and may be lawful
“ for the court, as well to give judgment of
“ *Ouster* against such person from his franchise,
“ as to fine such person.” Judgment of *Ouster*
had,

had, before the making of this statute, been given in some informations in the nature of *quo warranto*'s against the persons found or adjudged guilty of usurping franchises in corporations: but in the case of *Rex v. Bennett, Trin. 4 G. 1.* the judges were equally divided in opinion upon the question, Whether judgment of *Ouster* ought to be given at the common law, in an information in the nature of a *quo warranto*? As the judges were in that case equally divided in opinion; and as there has not been since any determination upon the point, we are of opinion; that judgment of *Ouster* ought not to be given in an information in the nature of a *quo warranto*, unless the case of the person found or adjudged to be guilty be within the statute.

We are likewise of opinion; that the case of the two defendants is not within the statute. As these defendants neglected to be sworn, the corporation might either have compelled them to be sworn, or might have elected other persons to be free burgesses: But as they were not sworn, they were never in possession of the franchises; and consequently, they could not be liable to a judgment of *Ouster*, for usurping or intruding into, or for unlawfully holding and executing the franchises.

We are likewise of opinion; that the case of the seven defendants is not within the statute. It is not necessary for the court to give an opinion; whether the non-residence of the seven defendants, and their neglect of attending and doing their duty as free burgesses, were *ipso facto* a forfeiture of their franchises; because if that were so, the defendants did, upon the forfeiture, cease to be burgesses; and consequently, they could not afterwards be liable
to

to a judgment of *Ouster*. In Lord *Bruce's* case, *Mich. 2 G. 2.* in this court, it was holden ; that if a person have been guilty of any thing, which amounts to an actual forfeiture of his franchise, the franchise does thereupon become vacant, and another person may be elected in his room.

It has been said ; that although the non-residence of the seven defendants, and their neglect of attending and doing their duty as free burgesses, were not *ipso facto* a forfeiture of their franchise, they were a good cause of amotion. It is not necessary for the court to give an opinion ; whether the non-residence, and neglect of the defendants were in the present case a good cause of amoving them ; because, however that may be, they could not be liable to a judgment of *Ouster*, until they were actually amoved. They could not be guilty of usurping or intruding into the franchises, because they came lawfully into possession thereof ; and as they had not only a right to hold the franchises, but were bound to do their duty as free burgesses, until they were actually amoved, they could not be guilty of unlawfully holding and executing the franchises.

It has been said ; that the power of amotion may not be given to a corporation by charter, or that, if it be given, the corporation may, from some corrupt motive, neglect or refuse to exercise it ; and it is inferred, that there must sometimes be a failure of justice, unless judgment of *Ouster* can be given in an information in the nature of a *quo warranto*, although there has not been an amotion. It was resolved in *Bagg's* case, 11 *Rep.* 99. that a man cannot be amoved from his franchise in a corporation, before he has been convicted of some crime, unless the corporation have the power of amotion

tion by charter or prescription : But it has been holden in divers modern cases, that the power of amotion is incidental to every corporation. It is not to be intended ; that any corporation will, for a corrupt motive, neglect or refuse to exercise its power of amotion ; and if a corruption should, from such motive, neglect or refuse to exercise it, yet there would not be a failure of justice ; in as much as a *Mandamus* may in such case be awarded.

It has been said ; that although the court should be of opinion, that the case of the two defendants, and the case of the seven, are both within the statute, yet the judgment ought to be reversed ; for that the case of the two defendants is so different from that of the seven, that a joint information in the nature of a *quo warranto* cannot be filed against the nine : But as we are of opinion ; that neither the case of the two defendants, nor the case of the seven, is within the statute, and consequently, that the whole judgment must be reversed, it is not necessary to give any opinion upon this point.

Rex verſ. Grew, Coroner of Middleſex.

IT was found by an inquisition taken by the defendant ; that only the near fore wheel of a waggon did move to the death of a man ; and that only the near fore wheel was forfeited as a *Deodand*.

The court ought not to contradict the finding of a jury, as to a matter of

fact.
Upon a motion to quash the inquisition, it was said to be exceedingly improbable, if not altogether impossible ; that only the near fore wheel of a waggon should move to the death of a man.

A rule to shew cause was refused.

K k

And

And by the court—As the question in this case was a question of fact, and the jurors have found, that only the near fore wheel of the waggon did move to the death of the man, the court ought not to quash the inquisition.

Abery vers. Dickenfon.

The books of commissioners ought not to be inspected, unless they are parties.

UPON a motion, for a rule to inspect and take copies of the books of the commissions for licensing hackney coaches, it appeared that the defendant was an officer under the commissioners; and that the action, which was an action of trespass, was brought against him for taking a distress, for a penalty inflicted by the commissioners upon the plaintiff.

A rule was refused.

And by the court—As the commissioners are not parties to the action, the plaintiff ought not to have the liberty of inspecting and taking copies of their books.

Howard vers. Cheshire.

A certificate upon the 43 *Eliz. c. 6.* holden to be good.

IN a Case reserved in an action of trespass, it was stated; that the action was brought for taking a distress; that the defendant justified the taking as agent to general *Cholmondley*, by virtue of a reservation in a lease of land from the general to the plaintiff; that issue was joined upon a traverse of the defendant's being agent to the general; that a verdict, with one penny damages was found for the plaintiff; and that there was a certificate upon the 43 *Eliz. c. 6.*

The

The question was, whether the plaintiff ought to have any more costs than damages?

It was holden by *Denison J.* and *Foster J.* (*Ryder Ch. J.* and *Wilmot J.* being abient) that he ought not.

And by *Denison J.*—It has been said; that this is not a case, in which a certificate ought to be granted upon the 43 *Eliz. c. 6.* an interest in land being in question, and the case of *Affer v. Finch*, 2 *Lev.* 234. has been relied upon; in which it was holden, that the plaintiff, for whom a verdict was found upon an issue joined on a plea of *extra viam*, was entitled to full costs. But in that case, the extent of the way, and consequently an interest in land, was directly in question; whereas in the present case, the issue is collateral to the plaintiff's interest in the land demised.

Leathley *vers.* Webster.

IN an action for money had and received to the plaintiff's use, it was found by a special verdict; that the company of cutlers in *Hallamshire* in the county of *York*, which were incorporated by the 21 *Ja. 1. c. 31.* have a power given by that statute of making such by-laws as are not contrary to the law of the land; that in the year 1718, the company made a by-law, whereby it is ordered, that the clerk of the company shall receive fifteen shillings for every pair of indentures of apprenticeship which shall be inrolled by him, and that it shall be referred to the master and wardens of the company, to ascertain how much of the fifteen shillings shall be deducted for the benefit of the company; and that the clerk of the company had insisted upon and received

A by-law which is uncertain, or contrary to a statute, is void.

fifteen shillings from the plaintiff for the enrolling of a pair of indentures, by which the plaintiff's son was bound an apprentice to a member of the company.

The question was, if this by-law be good ?

It was holden, that it is not.

And by *Ryder* Ch. J.—The by-law is void for uncertainty ; in as much as it does not say, how much of the fifteen shillings shall be deducted for the benefit of the company ; but refers it to be ascertained by the master and wardens, how much shall be deducted. As it does not moreover appear, that the master and wardens have ever ascertained the sum to be deducted for the benefit of the company, the clerk had no right to receive any thing on that account. If this by-law were not void for uncertainty, it would nevertheless be void ; because it is contrary to the 22 *H.* 8. *c.* 4. whereby it is enacted: “ that no master, wardens, “ or fellowships of crafts, take from hence- “ forth of any apprentice, or of any other per- “ son, for the entry of any apprentice into their “ fellowship, above the sum of two shillings “ and sixpence.”

Rex vers. Hellier.

Bail to articles of the peace must be put in in this court.

UPON a rule to shew cause, why a *mandamus* should not be awarded to two justices of the peace in the county, to take a recognizance for keeping the peace, it appeared ; that articles of the peace had been exhibited in this court ; that the defendant was in prison ; and that he was so poor, as not to be able to be at the expence of a *Habeas Corpus* for bringing him up to this court.

The rule was discharged.

And

And by the court.—It has always been doubted ; whether a recognizance for keeping the peace can be taken by justices of the peace, upon articles of the peace exhibited in this court. There is only one instance of late years, wherein a *mandamus* for taking such a recognizance has been awarded ; and in that case, which was the case of *Rex v. Lewis, Trin. 3 G. 2.* there were very particular circumstances ; namely, that the defendant was seventy years of age ; and that he was so infirm as not to be able to travel.

Rex vers. Griffith.

UPON a motion for an attachment for a rescue, a feigned issue was ordered, to try whether the defendant had been guilty of a rescue. The costs antecedent to the ordering of a feigned issue are only to be paid.

A verdict being found for the defendant, the question was whether he ought to have the costs of the motion, as well as the costs of the feigned issue ?

It was holden ; that he ought only to have the costs of the feigned issue.

And by the court—There is not any difference betwixt the present case, and the case of a feigned issue, ordered upon a rule to shew cause why an information should not be filed ; and it has been frequently holden, that in the latter case only the costs of the feigned issue ought to be paid.



Harris

Harris *vers.* Wakeman.

A custom which extends to the suburbs of a city, is good.

UPON a writ of *Error*, brought upon the judgment of an inferior court, it appeared; that in an action of debt, brought into the court of the mayor of *Worcester*, the plaintiff alledged in his declaration, that he is chamberlain of the city of *Worcester*; that by a custom of this city no person, not being a freeman, shall sell or put to sale by retail any goods within the said city, or the liberties or suburbs thereof; that by another custom the corporation have a power of making by-laws; that a by-law was made, whereby a penalty of four pounds is inflicted upon every person not being a freeman, who shall shew, sell or put to sale any goods by retail within the said city, or the liberties or suburbs thereof, to be recovered in an action of debt brought in the Mayor's court, in the name of the chamberlain; that one third of the penalty is to be paid to the person who shall inform, and the other two thirds to the treasurer of the corporation for the benefit of the poor; that issue was joined upon the plea of *nil debet*; that by the *venire facias* awarded twenty-four jurors were to be returned; and that there was a verdict and judgment for the plaintiff.

It appeared likewise from a bill of exceptions; that the jurors were freemen; that the judges were members of the corporation; and that the objections made at the trial upon these accounts were over-ruled.

The judgment was, upon great consideration, affirmed.

And

And by *Ryder Ch. J.*—We are of opinion ; that the objection made at the trial to the jurors and judges, were very properly overruled.

It has been said ; that a custom of a city, which extends to the suburbs of the city, is not good : But we are of opinion ; that such a custom is good. In the case of *The City of London v. Manley*, 1 *Roll. Abr.* 557. it was holden ; that the custom of the city of *London*, to have the meetage of coals within the port of *London*, extends from *Staines-Bridge* to *Yendal*. In the case of *Fazakerly v. Wilshire*, *Trin.* 7 *G.* 1. in this court, the authority of the case of *The City of London v. Manley* was recognized, and it was therein holden ; that the custom of the city of *London*, to have the meetage and portorage of corn and some other goods within the port of *London*, extends from *Staines-Bridge* to *Yendal*.

It has been said ; that the custom, it being in restraint of trade, is not good : But we are of opinion ; that it is good. In *Waganor's* case, 8 *Rep.* 126. it is laid down ; that a custom in restraint of trade in a particular place is good.

It has been said ; that the custom is not good, because fairs and markets are not excepted : But it is not in our opinion necessary that these should be excepted in such a custom. In *Waganor's* case, fairs and markets were not excepted, and yet the custom was holden to be good. It does not, moreover, appear to the court ; that there are either fairs or markets in the city of *Worcester*.

It

It has been said ; that the penalty inflicted by the by-law is inflicted upon every person who shall shew goods, whereas the custom does only extend to persons who shall sell or put goods to sale : But we are of opinion ; that the meaning of the word *shew*, and of the words *put to sale*, is the very same ; and if it were not, a by-law may be good in part.

It has been said ; that it is not shewn in the present action, in what manner the plaintiff was elected or appointed chamberlain, and that it is not sufficient, for the plaintiff to alledge that he is chamberlain ; because this may be alledged by any person : But we are of opinion, that it is sufficient for the plaintiff to alledge that he is chamberlain. In the case of *Hollidge v. Hungerford*, Pasch. 3 G. 1. in this court, it was holden ; that it is not necessary, in an action like the present, for the plaintiff to shew in what manner he was elected or appointed chamberlain ; and the same has been since holden in divers other cases.

It has been said ; that by the *Venire Facias* awarded in the present case, twenty-four jurors were to be returned ; whereas no more than twelve jurors ought to be returned for the trial of a cause in an inferior court : But this, it being only a misaward of process, is cured by the statutes of *Jeofails*. In the case of *Gibson v. Linley*, 1 Jo. 357. it was holden ; that the awarding of a *Venire Facias*, by which twenty-four jurors were to be returned for the trial of a cause in the court of *Newcastle*, was not error.

Rex

Rex *vers.* Stephens.

UPON a rule to shew cause, why a writ *A writ de ex-*
of *superfedeas* to a writ *de excommunicato* *communicato*
capiendo, should not be awarded, it appeared, *capiendo*,
from a *significavit* of a court of delegates, hol- *holden to be*
den in *Ireland*, to the Lord Chancellor of *Great-*
Britain, that the court of delegates was impow-
ered by the Lord Chancellor of *Great-Britain*,
to hear an appeal of the defendant from a sen-
tence of the court of the Archbishop of *Dublin*
in a suit concerning a will; that the court of
delegates affirmed the sentence of the Archbi-
shop's court, and condemned the defendant in
the sum of three hundred and thirty pounds for
costs; that the defendant had incurred the sen-
tence of the greater excommunication, by his
contempt in not paying the costs; that the
sentence of the greater excommunication had
been duly given and promulged against the
defendant, by a presbyter lawfully authorized
in that behalf by the court of delegates; and
that the defendant had been openly and pub-
lickly excommunicated, by the authority of
the court of delegates, in the face of the church.

It did likewise appear; that upon this *signi-*
ficavit a writ *de excommunicato capiendo* had been
issued from the court of chancery in *England*;
that the defendant was arrested thereupon; and
that he is now in custody.

The rule was upon great consideration dis-
charged.

And by *Ryder Ch. J.*—It has been said; that
the court of delegates ought not to have given
sentence, in as much as, it was only impow-
ered to hear the appeal: But the power of giving
L 1 sentence,

sentence was incidental to the power of hearing the appeal ; and if sentence could not have been given by the court of delegates, there would have been a failure of justice ; for the suit could not have been remitted to the Archbishop's court.

It has been said ; that although the court of delegates had a power of giving sentence, it had not a power to delegate the power of giving sentence to a presbyter : But we are of opinion ; that the act of the presbyter, which appears to have been done by the authority of the court, was the act of the court. It is, moreover, recited in the *significavit*, that the sentence of the greater excommunication was duly given, and a temporal court ought to give credit to every judicial act of an ecclesiastical court, in case the ecclesiastical court had jurisdiction in the matter.

It has been said ; that a writ *de excommunicato capiendo* ought not to have been issued from the court of Chancery in *England*, upon a *significavit* from a court of delegates in *Ireland* ; because there is no communication betwixt the *English* and the *Irish* courts of justice : But the court of delegates is not, in the present case, to be considered as an *Irish* court of justice. By an *Irish* statute, liberty is given of appealing from a sentence of the court of the Archbishop of *Dublin* to the King, in his chancery in *England* or in his chancery in *Ireland* ; and a power is given by that statute to the Chancellors of *England* and *Ireland*, respectively, of appointing delegates for hearing the appeal. If the appeal be to the court of chancery in *England*, the court of delegates may be, and frequently is holden in *England* : But if it be holden, as
was

was done in the present case, in *Ireland*; yet, as it is holden under an authority derived from the court of Chancery in *England*, it is to be considered as an *English* court.

It has been said; that as the name of the presbyter, by whom the sentence was given and promulged, is not mentioned in the *significavit*, the *significavit* is defective; for that, in case the defendant should submit to pay the costs, there is no person to whom a writ to absolve the defendant, or a writ *de cautione admitenda* can be directed: But we are of opinion; that either of these writs may and ought to be directed to the court of delegates, and not to the presbyter by whom the sentence was given and promulged.

Rex vers. Addington.

UPON a motion to make a rule of *nisi* If an attorney exceed his authority, he must answer for it to his client. *prius* a rule of this court, an affidavit was read, in which it was alledged; that the rule of *nisi prius* was entered into by the attorney for one of the parties, without the consent of the party or his council.

The rule of *nisi prius* was ordered to be made a rule of this court.

And by the court—If an attorney exceed his authority, and his client be thereby prejudiced, the attorney is liable to make satisfaction to the client: But it is a motion of course, to make a rule of *nisi prius* a rule of this court.

Anonymous.

An information for hiring a man to marry a pauper, who was a cripple.

UPON a rule to shew cause, why an information should not be filed, it appeared; that the defendant, who was an officer of a parish had given a man money to marry a poor young woman, whose settlement was in the parish of which the defendant was an officer, and who was a cripple; whereby the charge of maintaining the young woman was brought upon the parish, wherein the husband's settlement was.

The rule was made absolute.

Howard *vers.* Cheshire.

If there be a certificate upon the 43 *Eliz.* c. 6. no costs are to be paid under the 4 *Ann.* c. 16.

UPON a rule to shew cause, why the plaintiff should not have the costs of a plea of justification, it appeared; that in an action of trespass the defendant had, with leave of the court, pleaded not guilty, and a justification; that issues were joined upon both pleas; that there was a verdict for the plaintiff upon both the issues, with one penny damages; that the judge had not certified, that the defendant had a probable cause to plead the matter pleaded in justification; and that there was a certificate upon the 43 *Eliz.* 2. c. 6.

The question was whether the plaintiff ought to have the costs of the plea of justification?

It was holden, that he ought not.

And by *Denison J.*—It has been said; that, as the issue joined upon the plea of justification

is

is found for the plaintiff, and the judge has not certified, that the defendant had a probable cause to plead the matter therein pleaded, the defendant is entitled under the 4 *Ann. c. 16.* to the costs of that plea: But the words of that statute are only, that costs shall in such cases be given at the discretion of the court; and it has been resolved at a meeting of all the judges, that if there be a certificate upon the 43 *Eliz.* the plaintiff shall not have the costs of any plea pleaded with leave of the court; although the issue thereupon joined be found for him, and the judge have not certified that the defendant had a probable cause for pleading the matter therein pleaded,

Hilary

Hilary Term,

29 Geo. 2. 1756.

Sir Dudley Ryder,	<i>Chief Justice.</i>
Sir Thomas Denison,	} <i>Justices.</i>
Sir Michael Foster,	
Sir John Eardly Wilmot,	

Lee vers. Wallis.

A by-law.
restraining
the number
of persons,
out of whom
an election is
to be made,
is not good.

IN an action of *trespass*, for taking and converting the plaintiff's goods, the defendant pleaded; that the inhabitants of the town of *Godalming* were incorporated by a charter from Queen *Elizabeth*, and that a power was given by the charter of making by-laws; that by the charter certain officers called wardens were to be elected out of the inhabitants at large; that a by law was made, whereby it is ordained, that the wardens shall be elected out of the court of assistants; that the court of assistants are elected out of persons who have served certain offices, and not out of the inhabitants at large; that a penalty of ten pounds is inflicted by the by-law upon every person elected warden, who shall refuse to execute the office; and a power is given

given of levying the penalty, and in case it be not paid upon demand, by distress and sale of the goods distrained; that the plaintiff being elected warden, he refused to take upon himself the office; that a demand was made of the penalty, which the plaintiff refused to pay; and that the goods, for the converting of which the action is brought, were distrained and sold to satisfy the penalty.

Upon a demurrer to this plea, the question was, Whether the by-law be good?

It was holden that it is not.

And by *Ryder Ch. J.*—A by-law to restrain the number of persons out of whom an officer may be elected, is not good. In the case of *Rex v. Tucker, East. 15 G. 2.* it appeared; that by the charter a certain officer was to be elected out of four persons nominated by the burgesses at large; and that it was ordered by a by-law, that the four nominees shall be aldermen, or that at least one of them shall be an alderman. This by-law was holden to be void; and the judgment was affirmed in the house of Lords. In the case of *Rex v. Phillips, Trin. 22 G. 2.* it was holden; that a by-law to restrain the number of electors may be good; in as much as, the inconveniencies, which frequently attend popular elections, may be thereby prevented: But that a by-law to restrain the number of persons, out of whom an election is to be made, is bad, because the constitution is thereby narrowed.

This by-law is bad for another reason; namely, that it gives a power of selling the goods distrained, and by so doing, renders the distress irreplevisable; whereas by the common law, every distress is replevisable. By
the

the 2 *W & M. c. 5.* a power of selling the goods distrained for rent in arrear is given : But five days are allowed by that statute for replevy-ing the goods ; whereas under this by-law, the goods may be sold immediately after they are distrained.

Berks vers. Mason.

A new trial granted; because the judge was dissatisfied with the verdict.

UPON a rule to shew cause, why a new trial should not be had ; *Ryder* Ch. J. before whom the cause was tried, reported ; that there was evidence on both sides ; but that the evidence, for the party in whose favour the verdict is found, was so very slight, that the jury ought not, in his opinion, to have regarded it : And that the evidence for the other party was very strong ; and he concluded with saying, that he was dissatisfied with the verdict.

At a former day, when this rule came on, it was said on shewing cause ; that if there be evidence on both sides, a new trial ought not to be granted, and the case of *Smith v. Huggins*, *Mich. 14 G. 2.* in this court was relied upon ; wherein a new trial was refused, although *Lee* Ch. J. reported ; that the evidence for the plaintiff, in whose favour the verdict was found, was slight, and that he had summed up strongly for the defendant : The opinion of the court being, that as there was evidence on both sides, a new trial ought not to be granted.

The matter was at that day ordered to stand over, for the chief justice to look into his notes, in order to make a fuller report.

After

After the Chief Justice had made the above report, it was said in support of the rule; that if the judge declare himself to be dissatisfied with the verdict, it is the constant practice to grant a new trial; and nothing was said by the council who had shewn cause at the former day.

The rule was made absolute.

Gardiner *vers.* Atwater.

UPON a motion in arrest of judgment, Words are to be construed by the court as they are generally understood. in an action upon the case for words, it appeared, that there were several counts in the declaration; that the words in one count were, *Thou art a sheep-stealing rogue, and farmer Parker told me so*; and that the words in another count were, *Thy character is good for nothing; it sounds every where, that thou art a sheep-stealer.*

The rule was discharged.

And by Denison J. (*Ryder Ch. J.* being absent.)—Divers old cases have been cited, in which it is laid down; that if words can be construed by the court in such sense as not to be actionable, they ought to be so construed: but it is at this day settled, that words are to be construed by the court in that sense, wherein they are generally understood; and there can be no room for doubt, whether the words in the present case do import a charge of felony.

It has been said; that although the court shall be of opinion, that the words, *thou art a sheepstealing rogue*, are actionable; yet the plaintiff ought not to have judgment; because

M m

it

it is not averred, that farmer *Parker* did not tell the defendant so: But we are of opinion, that this averment is by no means necessary; it being quite immaterial, whether farmer *Parker* did or did not tell the defendant so.

Tomkins *vers.* Gratton.

A writ of
Fieri Facias
set aside for
irregularity.

UPON a rule to shew cause, why a writ of *Fieri Facias* should not be set aside for irregularity, it appeared; that an interlocutory judgment was signed, and a writ of enquiry was executed, but before final judgment was signed, the defendant died; that after the defendant's death, the plaintiff sued out one writ of *Scire Facias*, and upon the return thereto sued out the writ of *Fieri Facias*.

The rule was made absolute.

And by the Court.—Two writs of *Scire Facias* must in such case be sued out by the plaintiff, before he can sue out a writ of *Fieri Facias*; one before the final judgment is signed, in order to make the executors or administrators parties to the record; the other after the final judgment is signed, in order to give them an opportunity of pleading no assets, or any other matter in their defence; for it would be very unreasonable, that the executors or administrators, should be in a worse situation, where their testator or intestate dies before the final judgment was signed, than they would have been, if the testator or intestate had died after the final judgment was signed.

Rex *vers.* Corbett and Coulson.

UPON a rule to shew cause, why an information should not be filed against the defendants, it appeared; that the defendants, who were justices of the peace for *Walsal* borough, had refused to appoint overseers of the poor for the division of *Walsal Foreign*; and that they had refused to do this, after it had been found by a verdict, upon a signed issue ordered by this court with consent, that *Walsal Foreign* is a distinct division in the parish of *Walsal*; and after peremptory *Mandamus* had, in consequence of the verdict, been awarded, for appointing separate overseers for the division of *Walsal Foreign*.

An information may be filed against Justices of the Peace for disobedience to a *Mandamus*.

The Court inclined to make the rule absolute.

And by *Ryder* Ch. J.—It is a settled point, that justices of the peace ought not to be punished criminally, for a mistake arising from an error in judgment: but the conduct of the defendants, in the present case, has been so extremely perverse and obstinate, that it must have proceeded from some partial or corrupt motive.

The rule was afterwards discharged, upon the defendants paying the costs of this rule, and entering into a rule; that they will at *Easter* next appoint separate overseers for the division of *Walsal Foreign*, and sign the rules made by such overseers.

Wilson *vers.* Wymonfold.

A plea of
Puis Darrein
Continuance
set aside.

UPON a rule to shew cause, why a plea of *Puis Darrein Continuance* should not be set aside for irregularity, it appeared; that the plaintiff, who sued as a *Feme Sole*, was married, and that this was pleaded in the plea: but it likewise appeared; that the plaintiff was married before the last continuance day.

The rule was made absolute.

And by the Court—As the plaintiff was married before the last continuance day, the defendant cannot plead this in a plea of *Puis Darrein Continuance*.

Rex *vers.* the Inhabitants of Marwood.

A sett'ement
may be gain-
ed by being
possessed of,
and residing
forty days in
a leasehold
house.

IN an order of sessions, it was stated; that *Henry Sloper*, father of the *Pauper's* wife, being possessed of a house in the parish of *Kerlesbury*, for the remainder of a term of ninety-nine years, determinable upon the death of *J. S.* in consideration of natural love and affection, granted it in the year 1741 to his daughter for life, with remainder to her daughter; that in the grant there was a reservation of one room for himself, and the lord's rent, which was ten shillings a year, was to be paid by the grantee; that the *Pauper* and his wife soon after entered upon the house, and from time to time paid the lord's rent; that they resided therein till the lease was determined by the death of *T. S.* and that no other consideration was mentioned in the lease, than the sum of twenty shillings, and the annual rent of ten shillings to be paid to the lord.

The

The question was, whether the *pauper* did gain a settlement in the parish of *Kerlesbury*?

It was holden, that he did.

And by *Ryder Ch. J.*—Before the 9 G. 1. c. 7. a man might gain a settlement, by residing forty days in a house purchased by himself, how small soever the sum was for which it was purchased. By that statute it is provided; “That no person shall be deemed to gain a settlement in any parish, by virtue of any purchase of an estate or interest in such parish, whereof the consideration doth not amount to the sum of thirty pounds, *bona fide* paid, for any longer time than such person shall inhabit in such estate.” If the *Pauper* had paid any pecuniary consideration, he would have been a purchaser of the house, although the grant was to his wife: but as he did not, he was not a purchaser within the meaning of that statute; and consequently he did gain a settlement. Under the word purchase, in the large sense of that word, every acquisition of an estate by gift, marriage settlement or devise, or by any other way, except it be by some act of law, is comprehended: but as the 9 G. 1. does say expressly, that a settlement shall not be gained by purchasing an estate, unless the consideration-money be *bona fide* paid, that statute can only extend to purchases for pecuniary considerations.

Atherley vers. Evans.

IN an action of *Indebitatus Assumpsit*, the plaintiff declared, as executor of *John Cosins*, upon several promises.

A simple contract debt is not discharged by being allowed in a settled account.

The

The defendant pleaded; that after the time of making the promises, the plaintiff's testator and the defendant accounted together; that upon the settling of the account, the defendant was in arrear to the Plaintiff's testator in the sum of twelve pounds; that the defendant afterwards paid the said twelve pounds, to wit, ten pounds, part thereof, to the plaintiff's testator during his life, and the remaining two pounds to the plaintiff after his testator's death.

Upon a demurrer to this plea, it was holden to be bad.

And by *Ryder Ch. J.*—It has been said; that as the payment of the twelve pounds, which is pleaded specially, might have been given in evidence upon the general issue; the plea, as to that part of it, does amount to the general issue, and consequently that it is bad: but it is not universally true, that if a matter, which might have been given in evidence upon the general issue, be specially pleaded the plea is bad; for infancy, or a release, may be given in evidence upon the general issue, and yet either of these may be pleaded specially.

We are of opinion, that this plea is bad; because the matter therein alledged, and relied upon, in bar of the action, is not a discharge of the original debt. If the defendant had given a bond to the plaintiff's testator, in satisfaction of the original debt, this, although it would not have been a payment, would have been a discharge of the original debt; because, as the original debt was upon simple contract, it would have been extinguished by the bond, which is a security of higher nature:

ture: but it was not extinguished by being allowed in the settled account. The case of *Milward v. Ingram*, 2 Mod. 44. Trin. 27. c. 2. has been cited, and relied upon, in which it was holden; that a simple contract debt is extinguished by being allowed in a settled account: but in a subsequent case, *May v. King*, 12 Mod. 537. Trin. 13 W. 3. the contrary was holden. In the latter case, the authority of the case of *Milward v. Ingram* was expressly denied; and its authority has been since frequently denied.

Easter Term,

29 Geo. 2. 1756.

Sir Dudley Ryder, *Chief Justice.*

Sir Thomas Denison,
Sir Michael Foster,
Sir John Eardley Wilmot, } *Justices.*

Standen on the Demise of Wheatly *vers.*
Hall.

If a cause be made a remanet at one assize, the costs of that assize follow the verdict.

UPON a rule to shew cause, why the defendant should not have the costs of two assizes, it appeared; that at the first assize, the cause was made a *Remanet* by the order of the judge; and that at the next assize, there was a verdict for the defendant.

The rule was made absolute.

And by the court—It has been said; that in the Court of Common Pleas, only the costs of the latter assize are in such case allowed: but it is the practice of this court to allow the costs of both assizes.

Weston

Weston *vers.* Donelly.

UPON a rule to shew cause, why the plaintiff, who had obtained a verdict, should not pay costs to the defendant, it appeared; that at the time of commencing the action, the defendant was resiant in the borough of *Southwark*; that the borough of *Southwark* is within the jurisdiction of the Court of Requests, erected by the 22 G. 2. c. 47. that the plaintiff had alledged in his declaration, that the sum which is due to him from the defendant was more than forty shillings; and that the verdict was for only thirty shillings.

If less than
forty shillings
be recovered,
the plaintiff is
in some cases
liable to costs.

The question was, whether the plaintiff be liable to costs?

It was holden that he is; and, in order to authorise the master to tax costs for the defendant, a rule was made for entering the following suggestion upon the plea roll; namely, that no more than thirty shillings was recovered; and that at the time of commencing the action, the defendant was resiant in the borough of *Southwark*, and was liable to be summoned before the Court of Requests for the town and borough of *Southwark* in the county of *Surry*.

And by *Ryder Ch. J.*—It has been said; that, the words of the 22 G. 2. c. 47. being,
“ that, if in any action *the debt to be recovered*
“ by the plaintiff doth not amount to forty
“ shillings, the plaintiff shall pay costs to the
“ defendant;” the plaintiff is not liable to costs; for that, as he has alledged in his declaration, that the sum due to him from the

N n

defend-

defendant, was more than forty shillings, *the debt to be recovered* in the action did amount to forty shillings: but we are of opinion; that as the plaintiff did not obtain a verdict for forty shillings, he is liable to costs. In the 3 *Jas.* 1. c. 15. by which a court was erected for the recovery of small debts within the city of *London*, the words are, *the debt to be recovered*: yet the construction has always been, that if the defendant be resident within the city of *London*, the plaintiff, in case he bring an action in one of the superior courts, is liable to costs, unless he obtain a verdict for forty shillings.

The Master and Wardens of the Society
of Innholders in *London* *vers.* Gledhill.

A by-law, compelling a person to accept the livery of a company, must shew that the company have a livery.

IN the declaration in an action of debt, for the penalty of five pounds inflicted by a by-law, it was alledged; that the society of innholders was incorporated by a charter from king *Charles* the second; that by the charter a power was given of making by-laws, and of inflicting penalties for the breach thereof; that a by-law was made, by which it was ordained, that every person, being a freeman of the company, who shall be elected upon the livery, shall accept the livery and cloathing, and upon so doing pay a fine of ten pounds; or upon a refusal to accept the livery and cloathing, shall forfeit the sum of five pounds to the master and wardens, to the use of the master, wardens and society, the penalty to be sued for by the master, wardens and society, in any of the king's courts; that the defendant, being a freeman of the company, was elected upon the livery; that due notice was given him of his being elected;

that

that he refused to accept the livery and cloathing ; and that he has not paid the penalty of five pounds.

Upon a general demurrer to this declaration, the question was, whether it be good ?

It was holden that it is not.

And by *Ryder Ch. J.*—A by-law of a corporation, whereby a penalty is inflicted upon such a member of the corporation, as does not pay obedience to the by-law, is good : but we are of opinion, that this declaration is not good ; because it is not therein alledged, that the company of innholders has a livery. It has been said ; that in divers acts of parliament, the livery of many companies in *London* is mentioned as a thing well known ; but it is very certain, that some companies in *London* have no livery ; and the court cannot intend, that the company of innholders is one of the companies which has a livery.

It has been said ; that the want of its being alledged in the declaration, that the company have a livery, is a matter of form, which cannot be taken advantage of upon a general demurrer : but we are of opinion ; that this is traversable, and might have been put in issue ; and consequently, that it is a matter of substance.

Foster J. concurred with *Ryder Ch. J.* and *Denison J.* in the above opinion ; and he added ; that the declaration is, in his opinion, bad upon another account ; namely, that it is therein alledged, that the defendant is a freeman of a company, whereas it ought to have been alleged, that the Defendant is a freeman of the city of *London* ; because any person, who keeps

an inn within the distance of three miles from the city of *London*, may, by the charter of this company, be a freeman of the company, although he be not a freeman of the city of *London*.

Wilmot J. concurred in opinion with the other Justices; and likewise with *Foster* J. in the objection made by him to the declaration.

Rex vers. Davis.

A collector of rates for the repair of a highway is a parish officer.

UPON a rule to shew cause, why a conviction, and an order of sessions affirming it, should not be quashed, it appeared; that *J. S.* had prosecuted *J. N.* for stealing a horse in the parish of *St. Leonard's, Shoreditch*; that *J. N.* was convicted; that *J. S.* obtained a certificate under the 10 & 11 *W. 3. c. 23.* that the certificate was duly inrolled, and assigned to the defendant; that *J. S.* was afterwards appointed a collector of the rates, made pursuant to the 22 *G. 2. c. 30.* for the better repairing of the highways in the parish of *St. Leonard's, Shoreditch*; that upon the refusal of *J. S.* to take upon himself that office, he was, notwithstanding his production of the certificate and assignment, convicted by a justice of the peace in the penalty of ten pounds, inflicted by the 22 *G. 2.* and that, upon an appeal to the quarter sessions, the conviction was affirmed.

The rule was made absolute.

And by *Ryder* Ch. J.—By the 10 & 11 *W. 3.* it is enacted, “ that every person who shall
“ apprehend and prosecute any person guilty
“ of any of the felonies therein mentioned,
“ until he or she shall be convicted, shall have
“ a cer-

“ a certificate, certifying within what parish
“ the felony was committed ; that the certi-
“ ficate may be once assigned over, and no
“ more ; and that the original proprietor of
“ the certificate, or the assignee of the same,
“ by virtue thereof, shall be discharged from
“ all and all manner of parish and ward offices,
“ within the parish or ward wherein the fe-
“ lony shall be committed.”

It has been said ; that as the appointment to this office is by the trustees of the turnpike, it is not a parish office : but the office is to be executed in the parish ; and consequently it is a parish office.

It has been said ; that the office, it being that of collector of rates at a turnpike, is a new office, which has been created long since the 10 & 11 W. 3. and consequently, that it cannot be an office within the meaning of that statute : but the office is not to be considered as a new office, it being no more than a new regulation in the ancient office of surveyor of the highways.

The other justices concurred in opinion with the chief justice ; and *Denison* and *Foster* J. added ; that, if the office were a new office, the defendant would, in their opinion, be exempted from serving it ; for that, as the certificate was intended to be a reward, for the apprehending and prosecuting of felons, the statute ought to have a liberal construction.

Rex *vers.* Beaumont.

A court of quarter sessions has not jurisdiction of perjury.

UPON a rule to shew cause, why an indictment should not be quashed, it appeared; that the indictment was for perjury; and that it was found at a court of quarter sessions.

The rule was made absolute: but it was ordered to be inserted in the rule, that the indictment was quashed; because a court of quarter sessions has not jurisdiction of the offence of perjury.

Rex *vers.* Severn and Arnold.

An appointment of overseers of the poor for a precinct is void.

UPON a rule to shew cause, why an appointment of overseer of the poor should not be quashed, it appeared; that the defendants were appointed, by two justices of the peace, overseers of the poor within the precinct of the tower, otherwise called the parish of *St. Peter's ad Vincula*, within his majesty's tower of *London*; and that they were appointed under the 43 *Eliz. c. 2.* and not under the 13 & 14 *C. 2. c. 12.*

The rule was made absolute.

And by *Denison J* — We are of opinion; and the late (F) chief justice did concur in this opinion, that the appointment of the defendants to be overseers of the poor is void. It does expressly appear, to be an appointment under the 43 *Eliz*: but it is not a good appointment under that statute, or under the 13 & 14 *C. 2.* The former of these statutes does only give a power of appointing overseers

(F) The late Chief Justice died upon the twenty-fifth day of *May*; this judgment was given upon the thirty-first day of that month.

of the poor in parishes; and this power is by the latter statute only extended to townships and vills: and we are of opinion; that both these statutes, which have in other instances been construed strictly, ought to be so construed in the present case. In the case of *Rex v. Curle and others*, Mich. 20 G. 2. it was holden; that the very words *substantial Householders*, which are the words of the 43 Eliz. must be used in an appointment of overseers of the poor; and an appointment, wherein the persons appointed were called *principal inhabitants*, was quashed: and the same strictness in construing this statute has been observed in divers other cases.

It has been said; that, as the place of which the defendants were appointed overseers, is called the parish of *St. Peter's ad Vincula*, within his majesty's tower of London, as well as *precinct of the tower*, it is a parish by reputation, and the case of *Hilton v. Pawle*, Cro. Car. 92. has been cited, in which it was holden; that a parish is within the meaning of the 43 Eliz.: but although a place may be a parish by reputation, and although overseers of the poor may be appointed for such place; yet an appointment of overseers for such place will be bad, unless the place be therein expressly called a parish. In the present case, the description of the place is, *precinct within the tower*; for the words, *Parish of St. Peter's ad Vincula, within his majesty's tower of London*, are under an otherwise called; and the rule in such cases is, that the name or description which precedes an *otherwise called*, is always to be considered as the true name or description, and not the name or description which follows. In an anonymous case, 3 Bulstr.

Bulfir. 296. it is said, that the whole court was clearly of opinion; that the true name of a man is that which does precede an *Alias Dictus*, and an indictment was in that case quashed, because the addition of the person indicted followed the *Alias Dictus*.

It has been said; that, although the place, of which the defendants were appointed overseers be not a parish, the court may intend that it is a township or vill, within the meaning of the 13 & 14 C. 2. But, as it is not expressly called a township or vill in the appointment, the court ought to intend that it is a township or vill, in order to make an appointment good which is not warranted by that statute.

Rex vers. Alderton.

If the words in an advertisement are not libelious, without the help of an innuendo, the advertisement is not a libel.

UPON a rule to shew cause, why judgment should not be arrested in an information for a libel, it appeared; that an advertisement had been published by the defendant, wherein, after reciting divers prior advertisements, signed by the clerk of the peace for the county of *Suffolk*, relative to the distemper amongst the horned cattle, and mentioning divers orders, made for collecting and distributing of money on account of that distemper, it was said; that by those orders the money collected had been improperly applied.

In the information, which was for this advertisement, it was charged to be a libel upon the justices of the peace for the county of *Suffolk*; and as often as any particular order was mentioned in the information, there was this innuendo, meaning *an order of the justices of the peace for the county of Suffolk*.

The

The rule was made absolute.

And by *Denison J.*—We are of opinion, and the late chief justice did concur in this opinion, that the advertisement is not a libel upon the justices of the peace for the county of *Suffolk*. It does not appear, without the help of the *innuendo's*, that the orders, mentioned in the advertisement, were the orders of the justices of the peace for the county of *Suffolk*; and if the advertisement be not in itself a libel upon the justices, it cannot be made so by the *innuendo's*. In the case of *Barham v. Netherfall*, *Yelv.* 21. which was an action for words, it was alledged in the declaration; that the defendant had spoken the following words: *J. Barham hath burnt my barn*, innuendo, *my barn full of corn*. Judgment was in this case arrested; and by the court, the words, *hath burnt my barn*, are no slander, this being only a trespass, and the *innuendo* shall not help the matter. It is the nature of an *innuendo* to explain doubtful words, where there is matter sufficient in the declaration to maintain the action: but no words, produced by the *innuendo*, shall make the action maintainable. In the case of *Rex v. Greepe*, *Salk.* 513. the charge in an indictment for perjury was; that the defendant had sworn, that *J. S.* was upon a certain day at *Newnham*, innuendo, at *Newnham* in *Devonshire*; whereas in truth *J. S.* was not at *Newnham* aforesaid upon that day. Judgment was in this case arrested; and by the court, *Newnham* may as well mean *Newnham* in any other county, as *Newnham* in the county of *Devon*. An *innuendo* may explain and apply preceding words: but it cannot add to, enlarge, or change the sense of preceding words.

O o

It

It has been said; that it may, after a verdict, be intended, that the orders mentioned in the advertisement were proved, at the trial, to be the orders of the Justices of the peace for the county of *Suffolk*: but as this is not alledged, the court cannot intend that it was proved; because there was no necessity of proving it. In the case of *Buxenden v. Sharp*, *Salk.* 662. which was an action upon the case for keeping a bull accustomed to run mad, it was not alledged in the declaration, that the defendant knew the bull was accustomed to run mad. It was holden, that the defect of alledging this is not cured by a verdict; and by the court, as it was not necessary for the plaintiff to prove, at the trial, that the defendant knew the bull was accustomed to run mad, it cannot be intended, that this was proved.

Rex vers. The Justices of the Peace for the County of Westmoreland.

A *mandamus* to justices of the peace for hearing an appeal.

UPON a rule to shew cause, why a *Mandamus* should not be awarded, for the hearing of an appeal, it appeared; that there was an appeal from an order of two justices to a quarter sessions of the county of *Westmoreland*; that at this quarter sessions the appeal was adjourned to the next quarter sessions, and an order was made, that the matter should, in the mean time, be referred to one of the judges of assize; that nothing was done in the matter by the judge of assize, to whom it was referred; and that at the quarter sessions, to which the appeal was adjourned, the court refused to hear the appeal, and did not adjourn it to any other quarter sessions.

A peremptory *Mandamus* was awarded; by which the justices of the peace, for the county of

of *Westmoreland*, were commanded to hear the appeal at the next quarter sessions.

And by the court—It has been said; that as the appeal was not adjourned from the last to the next quarter sessions, it is now at an end: but it will be incumbent upon the justices, who shall be at the next quarter sessions, to consider well, whether the neglect of the last quarter session to adjourn the appeal, will be an excuse for their not obeying the *Mandamus* of this court.

Rex versf. the Inhabitants of Kingswood.

IN an order of sessions it was stated; that *Abraham Turner*, the father of the *Pauper*, whose settlement was in the parish of *Kingswood*, together with his wife *Anne*, resided many years in the parish of *Wickwar*, under a certificate from the officers of the parish of *Kingswood*, addressed to the officers of the parish of *Wickwar*; that, during their residence under the certificate, the *Pauper* was born; that the *Pauper* lived with her father and mother, in the parish of *Wickwar*, till the death of her father, and afterward lived with her mother, in that parish, without gaining any settlement; that about nine years ago, the *Pauper*, being afflicted with the small pox, was removed into a house, provided by the parish officers of *Wickwar*, for the reception of persons, *Paupers* of *Wickwar*, afflicted with the small pox; that she was provided for, in common with other *Paupers* ill of the same distemper in that house, until she was recovered, by *J. S.* an inhabitant of *Wickwar*, but not a parish officer; that *J. S.* declared afterwards, that he was paid the expence he had been at on account of the *Pauper*, but did not say by whom; that, during all the time

A person is not to be removed, until he becomes chargeable to the parish, in which he resided under a certificate.

the *Pauper* was in that house, her mother rented a house in the parish of *Wickwar*, in which the *Pauper* might have lived, if she had not been removed as aforesaid, in order to prevent the spreading of the small pox; that the *Pauper*, since her recovery from the small pox, has lived with her mother in the parish of *Wickwar*, and supported herself by her own labour; that the *Pauper* was lately removed, by an order of two justices, to the parish of *Kingswood*; and that the order was affirmed upon an appeal to the quarter sessions.

The question was, Whether the *Pauper* was liable to be removed to the parish of *Kingswood*?

It was holden, that she was not.

And by the court—The *Pauper*, at the time of the removal, resided in the parish of *Wickwar* under a certificate; and consequently, she was not liable to be removed to the parish of *Kingswood*, unless she did become chargeable to the parish of *Wickwar*. If it had appeared; that the expence, incurred upon the *Pauper's* account, when she had the small pox, was defrayed by the parish of *Wickwar*, it would have been a question; whether that was a becoming chargeable, for which the *Pauper* and her mother were liable to be removed to the parish of *Kingswood*? There would likewise, in that case, have been another question; namely, Whether the *Pauper*, who had, during the nine years preceding the removal, supported herself, was liable to be removed to the parish of *Kingswood*, on the account of her having been chargeable so long before? But as it does not appear, that *J. S.* was reimbursed the expence he was at on account of the *Pauper* by the parish of *Wickwar*,
we

we are of opinion ; that, at the time she was removed, she was not liable to be removed to the parish of *Kingswood*.

Cope *vers.* Marshall.

UPON a rule to shew cause, why the plaintiff should not have leave to amend his replication, it appeared ; that issue was joined upon the replication ; that the record was entered at an assize ; and that it was made a *remanet* for defect of jurors. An amendment allowed, after the cause was made a *remanet*.

The rule was made absolute.

And by *Denison J.*—In the case of *Dryden v. Langley*, *Trin. 24 G. 2.* in the court of common pleas, leave was given to amend after issue had been some time joined ; and it seems to be reasonable, that, if the justice of the case require it, leave should be given to amend, after a cause has been entered at an assize and made a *remanet*.

Rex *vers.* The Inhabitants of Bradenham.

IN an order of sessions, it was stated ; that *J. S.* and his wife and children were removed, in *December 1754*, by an order of two justices, from the parish of *Thame* to the parish of *Bradenham*, and that this order, upon an appeal to the quarter sessions, was reversed ; that soon after *J. S.* ran away from his family ; that thereupon his wife and children were removed by another order of two justices from the parish of *Thame* to the parish of *Bradenham*, and that this order, upon an appeal to the quarter sessions, was affirmed. An order of sessions not permitted to be amended.

After

After a rule had been obtained, to shew cause why the two orders of the justices, and the second order of sessions should not be affirmed, another rule was obtained, to shew cause why the first order of sessions should not be amended.

The latter rule was obtained upon an affidavit; wherein it was alledged, that the first order of the justices was reversed by the quarter sessions; because it was not therein stated, that J. S. and his wife and children, were likely to become chargeable to the parish of *Thame*; and that the clerk of the peace had, by mistake, entered a general order of reversal.

This rule, although no affidavit was read upon shewing cause thereto, was discharged.

And by *Denison J.*—The court cannot make this rule absolute, without giving credit to an affidavit which is contradictory to a record; and it would be of the most dangerous consequence, as well as contrary to an established rule of law, to give credit to such affidavit. If the clerk of the peace did make a mistake in entering the order of reversal, it is a hardship upon the parish of *Thame*: but the court ought never to depart from a general rule of the law, for the sake of relieving from a particular hardship.

At a subsequent day, the former rule was made absolute.

And by *Denison J.*—As the first order of removal was quashed upon the merits, the second order of removal ought not to have been made. It has been said; that J. S. might have

have gained a settlement in the parish of *Bradenham*, after the making of the first order of removal, or that the parish of *Bradenham* might be his wife's own settlement before marriage: but if either of these things were so, it ought to have been stated, in the second order of removal, or in the second order of sessions. In the case of *Alderton v. Felixtowe, Vin. Remov.* 467. it was holden, in a case like the present; that it cannot be intended, that a settlement was gained after the making of the first order of removal.

And by *Foster J.*—It appears, from a manuscript note, in my possession, of the case of *Honiton v. St. Mary-Axe, Mich. 9 Ann.* to have been holden in that case; that if an order of removal be quashed upon the merits, it is conclusive upon the parish removing, as to the parish to which the removal was; and that if an order of removal be affirmed upon the merits, it is conclusive upon the parish to which the removal was, not only as to the parish removing, but as to all other parishes.

Rex versf. the Inhabitants of St. Peter's
in Nottingham.

IN an order of sessions, it was stated; that during the residence of *J. S.* in the parish of *St. Peter's* in Nottingham, under a certificate from the parish of *Beeston*, addressed to the parish of *St. Peter's*, the *Pauper* was bound to him as an apprentice; that after the *Pauper* had served some time in the parish of *St. Peter's*, *J. S.* removed to the parish of *St. Mary*; and that the *Pauper* went with *J. S.* and served him in that parish about a year.

An apprentice to a certificate man may gain a settlement in any parish, except that to which the certificate is addressed.

The

The question intended to have been made was, whether the *Pauper* did gain a settlement in the parish of *St. Mary's*?

But the case of *Rex v. High and Low Bishopside*, *Trin.* 28 & 29 G. 2. being cited, wherein it was holden; that an apprentice to a certificate man may gain a settlement in any parish, except that to which the certificate is addressed, it was admitted; that the *Pauper* did gain a settlement in the parish of *St. Mary's*.

Trinity Term,

29 & 30 Geo. 2. 1756.

Sir Thomas Denison,
Sir Michael Foster,
Sir John Eardley Wilmot, } *Justices.*

MEMORANDUM. There was in this term no chief justice. Sir *Dudley Ryder*, the late chief justice, died during the last term; and lord *Mansfield*, who succeeded as chief justice, was not appointed until the next term.

Bush vers. Ralling.

UPON a rule to shew cause, why a new trial should not be had in an action upon the 2 G. 2. c. 24. it appeared; that the action was brought for the penalty given by the seventh clause of that statute, whereby it is enacted, "That if any person, by himself or any person employed by him, shall by any gift or reward, or by any promise, agreement or security, for any gift or reward, corrupt or procure any person to forbear to give his vote in any election of a member of parliament, such person shall forfeit the

The giving of money to forbear to vote, is an offence within the meaning of the 2 G. 2. c. 24.

P p

" sum

“ sum of five hundred pounds:” that it was alleged in the declaration, that the defendant, whilst *Ralph Thrale*, Esq; was a candidate for being a member of parliament for the borough of *Abingdon*, did corrupt *John Harvey* to forbear to give his vote for the said *Thrale*, by giving the said *Harvey* the sum of twenty guineas; that at the trial of the cause, it was ruled by *Foster J.* that *Harvey* was a competent witness; that the evidence of *Harvey* was, that the defendant did give him the sum of twenty guineas, to forbear to vote for *Thrale*, but that *Harvey* did, even at the time of taking the twenty guineas, intend to vote for *Thrale*, and did afterwards vote for him; and that there was a verdict for the plaintiff.

The rule was discharged.

And by *Denison J.*—We are of opinion, and the late chief justice did concur in this opinion; that a new trial ought not to be granted. Two objections have been made to the competency of *Harvey* to be a witness; namely, that he was a *Particeps Criminis*, and that the tendency of his evidence was to discharge himself from penalties and disabilities. It would, perhaps, be a full answer to these objections to say, that a *Particeps Criminis*, although the tendency of his evidence be to obtain a pardon, or even a reward for himself, is, in divers cases a competent witness: but another answer, deducible from a clause of the statute upon which the present action is brought, may be given. By *par. 8.* of that statute it is enacted, “ That if any person
“ offending against this act shall, within twelve
“ months after the election of a member of
“ parliament, discover any other person
“ offending against this act, so that such per-
“ son

“son so discovered be thereupon convicted,
 “such person so discovering, and not having
 “been before convicted of any offence against
 “this act, shall be indemnified and discharged
 “from all penalties and disabilities, which
 “he shall then have incurred by an offence
 “against this act.” This seems to be a legislative declaration, that one person, offending against this act, may be a witness against another offending against it; for it is not probable, that the legislature should intend to discharge one offender against this act from all penalties and disabilities, upon discovering another offender against it, in such a manner that the latter be convicted, without intending at the same time, that the former should be a witness against the latter.

In the case of *Phillips v. Fowler*, it was ruled at *Nisi Prius*, by *Eyre C. J.* of the Court of Common Pleas, that *Hoare*, to whom money had been given to forbear to vote for a candidate, was a competent witness against the giver of the money, in an action for the penalty given by the 2 G. 2. c. 24. and it was said by the Ch. J. that unless the evidence of the taker of the money, notwithstanding he is a *Particeps Criminis*, be in such case admitted, the statute will be of very little avail. A new trial was indeed granted in that case: but, as it appears from 1 *Barn.* 325. that the new trial was granted upon account of the jurors having determined, as to the finding of their verdict, by casting lots, it may fairly be inferred; that the opinion of the Ch. J. as to the competency of *Hoare* to be a witness, was acquiesced under.

It has been said; that as *Harvey*, even at the time of taking the money, intended to

vote for *Thrale*, there was no assent of his mind to the proposal of forbearing to vote, and consequently, that the defendant did not corrupt him to forbear to vote: but we are of opinion; that, whatever the intention of the taker of the money is, at the time of taking it, the offence of corrupting is complete, as to the giver of the money, by giving it to forbear to vote for a candidate; and that it would be a very narrow construction of a statute, which was intended to prevent every mode and species of corruption, to hold; that, because the mind of *Harvey* did not assent to the proposal of forbearing to vote, the defendant, who, by giving the money did all that was in his power to corrupt *Harvey*, was not guilty of corrupting him.

It has been said; that although the words, *unlawfully procure or suborn*, in the 5 *Eliz. c. 9.* are in the disjunctive, the construction has been, that the offence of subornation of perjury cannot be, unless there has been a perjury; and it is inferred; that although the words, *corrupt or procure*, in the 2 *G. 2. c. 24.* are in the disjunctive, the construction ought to be, that the offence of corrupting to forbear to vote cannot be, unless there has been a forbearing to vote: but there is a wide difference betwixt the two cases. The word *suborn*, in the former statute, which is a technical word, means the same as *unlawfully procure*; and consequently, unless there be an unlawful procuring, there cannot be a suborning: but the meaning of the word *corrupt*, in the latter statute, is different from that of the word *procure*; and consequently, there may be a corrupting, although there be not a procuring. It does moreover seem to have been the intention of the 2 *G. 2. c. 24.* to make the giving
of

of money to forbear to vote an offence, although there be not a forbearing to vote; for the taker of money to forbear to vote is liable to all the penalties and disabilities of that statute, although he do not forbear to vote; and it is not to be conceived, that the legislature did mean, to inflict a more severe penalty upon the person who takes money to forbear to vote, than upon the giver of the money.

There is another reason why the construction of 2 G 2. c. 24. ought to be, that the offence of corrupting to forbear to vote may be, although there is not a forbearing to vote; namely, that if the construction should be otherwise, an action can never be maintained upon that statute against the giver of money to forbear to vote, if the taker of the money die before the election.

Pearce vers. Davy.

UPON a rule to shew cause, why a dilatory plea should not be set aside, it appeared; that the affidavit was not positive as to the truth of the fact pleaded; but there was something alledged in the affidavit, from whence it might fairly be inferred, that the fact pleaded is true.

A dilatory plea set aside, because it was not verified by affidavit.

The rule was made absolute. *Denison J.* and *Wilmot J.* being of opinion, that the affidavit is not sufficient.

And by *Denison J.*—It has been said; that it is sufficient under the 4 *Ann c. 16.* if any matter be shewn to the court by affidavit, to induce them to believe, that the fact of the plea is true: but the construction has always been; that the affidavit must be positive as to every matter of fact; for that the words probable matter, in that statute, do only extend

to

to a matter of record, or to some other collateral matter, as to the truth of which there cannot be a positive affidavit.

Foster J. inclined to be of opinion, that the affidavit is sufficient; in as much as, it may be fairly concluded from what is therein alleged, that the fact pleaded is true.

Griffith *vers.* Hollier.

An amendment allowed after two terms, by which the *Venue* was changed.

UPON a rule to shew cause, why the declaration should not be amended, by striking out the word *Worcestershire*, and inserting the word *Oxfordshire*, it appeared; that the action had been commenced more than two terms; and that the consequence of the amendment would be changing the *Venue*.

The rule was made absolute.

And by *Denison* J.—As the amendment, intended to be made, is an amendment at the common law, for the making of which no time is limited, the court may give leave to make it, notwithstanding the action has been commenced more than two terms, and the consequence of the amendment will be the changing of the *Venue*.

It has been said; that as it does appear, from the affidavit, upon which the rule to shew cause was made, when the bill was filed, it may have been filed merely to have something to amend by: but the court will not, in a case like the present, inquire into the time of filing the bill; it being sufficient for the purpose of amending, that a bill is filed.

It

It has been said ; that if the amendment intended should be allowed in the present action, which is an action upon a statute against a carrier, the pendency of the present action, which may have been brought collusively by a friend to the defendant, may be pleaded in bar to a subsequent action brought *bona fide* in the county of *Oxford* ; the consequence of which will be an elusion of the statute. If such collusion did appear, the court would actually refuse to give leave to amend : but the court will never presume that an action is collusive, unless it appear to be so.

Doe, on the Demise of Brownsmith,
vers. Denny.

IN a case reserved, in an action of ejectment, it was stated ; that, by a marriage settlement, an estate was conveyed to trustees, to the use of *Henry Tompson*, the husband, for life ; then to the use of *Mary*, the wife, if she survived her husband, for life ; then to the use of such child or children as shall be begotten by the said *Henry* upon the body of the said *Mary*, and for such estate and estates, and subject to such powers, conditions, provisions and limitations, as the said *Mary*, notwithstanding her coverture, shall by writing or will appoint ; and in default of such appointment, to the use of all such children of the said *Henry* and *Mary* in fee, equally to be divided amongst them, as tenants in common ; and in default of such issue, then to the use of such person as the said *Mary* shall by will appoint ; and in default of such appointment, then to the heirs of the said *Mary* for ever ; that *Henry* and *Mary* had issue one son, named *Henry* ; that *Henry*, the father, died ; that

A devise, under a supposed power, holden to be void.

Mary

Mary died afterwards, leaving the son under the age of twenty-one years; that during her widowhood she made a will, wherein she declared, that by virtue of certain powers given her by the marriage settlement, and of all other powers in her vested, she devised the estate to her son in fee, and, in case he should die under the age of twenty-one years, she devised the estate to the father of the defendant, in fee; that the son afterwards died, under the age of twenty-one years; and that the lessor of the plaintiff is heir at law to *Henry* the father, and to *Henry* the son.

The question was, whether the lessor of the plaintiff ought to recover?

It was holden, that he ought.

And by *Denison J.*—It was clearly the intention of the parties to the marriage settlement, that the issue of *Henry* and *Mary*, if there were any issue, should take an estate in fee. The power given to *Mary*, of devising it to a stranger, was only given in case of a failure of such issue. If *Mary* had survived her son, the devise to the father of the defendant would have been good; because there would in that case, agreeably to what is laid down in the case of *Holt v. Burleigh, Prec. in Chanc.* 294. have been a failure of issue within the meaning of the marriage-settlement: but as she did not survive her son, that devise is void.

Upon the whole, we are of opinion, and the late Chief Justice did concur in this opinion; that *Henry* took an estate in fee under the devise to him; or an estate in fee under the marriage-settlement; and that in either case, the lessor of the plaintiff ought to recover.

Tcoker

Tooker *vers.* the Duke of Beaufort.

IN an action of *Trespass*, the matter in issue was, whether certain lands, called *Woodcrofts*, were parcel of the manor of *Hinton Daubney*? An exemplification of a record of the court of Exchequer, under the seal of that court, is admissible evidence.

At the trial of the cause, an exemplification, under the seal of the Court of *Exchequer*, of a commission, and of the return thereto, were given in evidence by the plaintiff. The commission, which issued *Pasch. 33 Eliz.* some months after a grant by queen *Elizabeth* of the manor of *Hinton Daubney*, was to enquire, whether the prior of *St. Swithin's* in *Winchester*, was heretofore seised, in right of his priory, of certain lands, called *Woodcrofts*, as parcel of the manor of *Hinton Daubney*; and whether the crown had, since the dissolution of the priory, been seised thereof, as parcel of the said manor? The return to the commission was, that the prior was heretofore seised of these lands in right of his priory, as parcel of the manor of *Hinton Daubney*; and that, from the time of the dissolution of the priory to the time of the grant, the crown was seised thereof, as parcel of the said manor.

Upon a rule to shew cause, why a new trial should not be had, *Parker Ch. J.* before whom the cause was tried, reported, that the verdict, which was for the plaintiff, was in a great measure founded upon the evidence of the exemplification of the commission, and of the return thereto; and he added; that, if the court shall be of opinion, that the exemplification was not admissible evidence; there ought, in his opinion, to be a new trial.

The rule was discharged.

Q q

And

And by *Denison J.*—It has been said; that the exemplification was not admissible evidence; because it was not under the great seal: but we are of opinion; that an exemplification of a record of the court of *Exchequer*, under the seal of that court, is admissible evidence.

It has been said; that, as the crown was not in possession of the manor of *Hinton Daubney* at the time it issued, the commission was illegal; and consequently, that no proceeding under it is admissible evidence. In support of this objection, it has been said; that antecedently to the 22 *Ch. 2. c. 6.* by which statute that right is given, no subject had a right to such a commission. Our opinion as to this is, that, as there might have been a doubt, whether the queen was, at the time of the grant, in possession of the lands called *Woodcrofts*, or had at that time a right thereto; and consequently, whether these lands did pass by that grant, the commission for enquiring into that matter might be legal; and, if any case can be supposed, in which it might be legal, the court will, at this distance of time, suppose that case; for the sake of admitting the proceedings under the commission to be given in evidence.

It has been said; that the exemplification ought not to have been admitted in evidence against the present defendant: because, as the commission was a commission informing, and not a commission entitling, the person, from whom he derives a title to the lands called *Woodcrofts*, might be ignorant of the execution of the commission, or might not have an opportunity of being heard; and consequently, that the commission, and the return thereto, are to be considered as *res inter alios actæ*.

Our

Our opinion as to this is ; that the commission was general against all persons ; that the commissioners were bound to receive any evidence offered, to shew that the lands called *Woodcrofts* were not parcel of the manor of *Hinton Daubney* ; and that, if they had refused to receive any such evidence, the return might, and undoubtedly would have been quashed. As it does moreover appear ; that the commission was executed, and in a most public manner, within four miles of the manor of *Charlton*, the then owner of that manor, as parcel of which the lands called *Woodcrofts* are now claimed, could not be ignorant of its execution ; and if he did know thereof, he, as has been already observed, had an opportunity of shewing, that the lands called *Woodcrofts* were not parcel of the manor of *Hinton Daubney*.

Whitmore *vers.* Rooke.

IN an action of debt, by the assignee of a bail bond, the plaintiff alledged ; that a *precept*, called a bill of *Middlesex*, was sued out of this court against the defendant in the original action.

The issuing of a writ is matter of record in the court from which it issued.

The defendant pleaded ; that no such *precept* was sued out.

The plaintiff replied ; that such *precept* was sued out, as appears by the record of this court, and concluded with praying that the record may be inspected.

Upon a demurrer to this replication, the question was, whether the conclusion be good ?

It was holden, that it is.

Q q 2

And

And by *Denison J.*—The issuing of a writ from another court, as of an original from the Court of Chancery, is never a matter of record in this court, until the return thereto is filed: but the issuing of a writ from this court, although no return thereto be filed, is always a matter of record in this court; because there must always appear upon the roll an award of the writ.

It has been said; that the issuing of a bill of *Middlesex* is not pleadable, as a matter of record in this court: but we are of opinion that it is. If the writ pleaded in one court was issued from another, as if an original from the Court of Chancery be pleaded in this court, the issuing of the writ cannot be pleaded, as a matter of record in this court, unless the return thereto be filed; for until the return thereto is filed, the writ does not appear upon the rolls of this court: but if the writ pleaded was issued from the court wherein it is pleaded, as the bill of *Middlesex* was in the present case from this court, the issuing of the writ is pleadable, as a matter of record in this court, although no return thereto be filed; because the award of the writ must always appear upon the rolls of this court.

In the case of *Fisher v. Somerville*, *Trin.* 8 G. 2. in this court, the defendant pleaded the statute of limitations; the plaintiff replied a bill of *Middlesex*, with divers continuances; the defendant rejoined, that there was not such a bill with such continuances upon the record; the plaintiff surrejoined, that there was such a bill with such continuances, and concluded with praying, that the record might be inspected. The conclusion was holden to be good; and by the court, it will appear,
upon

upon inspecting the rolls of this court, whether there be such a bill of *Middlesex* with such continuances.

It has been said; that in the case of (G) *Esplin v. Smollet*, *East*. 23 G. 2. in this court, wherein the suing out of a writ of *Fieri Facias* was put in issue by the replication, it was holden; that such a replication ought to conclude to the country: but that case is of no authority in the present case. In that case, the levying of money under the writ of *Fieri Facias*, which is a matter of fact, was put in issue by the replication, as well as the suing out of the writ; and consequently, the determination in that case was conformable to what is laid down in the case of *Peter v. Stafford*, *Hob.* 244. namely, that if the matter of record, which is put in issue, be mixed with matter of fact, the trial ought to be by a jury: but in the present case, wherein nothing is in issue but the suing out of the bill of *Middlesex*, the conclusion to the record is proper.

Rex vers. the Inhabitants of East Lidford.

UPON a writ of *Error*, brought upon a judgment in an indictment, it appeared; that the indictment was found at a court of quarter sessions; that the charge therein was, that a certain part of the King's highway in the parish of *East Lidford*, being betwixt a certain place called the *Four-footed Cross*, and a certain bridge, dividing the said parish from the parish of *Datchet*, is ruinous, and that the defendant ought to repair the same; that the

It is not necessary to set out the length or breadth of a nuisance, in an indictment for the nuisance.

(G) Ante Page 208.

defendants

defendants were found guilty; and that a fine of twenty pounds was set upon them.

The question was, whether the length and breadth of the nuisance be set out with sufficient certainty.

It was holden, that it is.

And by *Denison J.*—*Halsey's* case, according to the report of it, 2 *Roll. Abr.* 181. is too nice, as to the necessity of precision in setting out the length and breadth of the nuisance in an indictment; and that in another report of the same case, *Latch.* 183. no notice is taken of the precision mentioned by *Rolle.* In the case of (H) *Rex v. Smith*, *Trin.* 27 *G.* 2. which was an indictment for laying rubbish in a certain place in the King's highway, in the parish of *Ottery St. Mary's*, being between a certain place called *Didbridge*, and a certain house called *Foxen Holes*, the nuisance was holden to be set out with sufficient certainty.

And by *Foster J.*—It has been said; that as the length and breadth of the nuisance are not set out with precision, this court cannot judge, whether a proper fine was set: but this court will presume, that the court of quarter sessions did set a fine adequate to the length and breadth of the nuisance proved.

And by *Wilmot J.*—According to some old cases, too much precision was, in my opinion, heretofore required, in setting out the length and breadth of the nuisance in an indictment.

(H) Ante Page 98.

Hyde,

Hyde, on the Demise of Culliford, *versf.*
Thrustout.

UPON a rule to shew cause, why the judgment signed in an action of ejectment, should not be set aside for irregularity, it appeared; that judgment was signed against the casual ejector, in the morning of the fifth day, after the end of the term wherein the judgment was moved for.

A judgment in an action of ejectment set aside, because it was signed too soon.

It likewise appeared, from the report of the master; that although the rule made upon the motion for judgment against the casual ejector is in the following words, "that if the tenant in possession shall not appear within four days after the end of the term, judgment may be signed against the casual ejector," judgment ought not, according to the usual practice of the court, to be signed before the afternoon of the fifth day after the end of the term.

The rule was made absolute.

And by *Denison J.*—The usual practice of the court, and not the letter of a rule, ought in such case to be adhered to.

Rex versf. Redman.

UPON a rule to shew cause, why a view should not be had in an indictment, it appeared, from the report of the Secondary of the crown-office; that, according to the usual practice of the court, a view ought not to be ordered in an indictment, or in an information without consent.

A view cannot be had in a criminal action without consent.

The

The rule was discharged.

And by *Denison J.*—The practice of the court has been very proper. The power given to the court, by the 4 *Ann. c. 16.* of ordering a view, being confined to civil actions.

Rex vers. Biffex.

It is not necessary to set out the evidence, in an order made by one or more justices of the peace.

UPON a rule to shew cause, why the adjudication of two justices of the peace, and an order of session confirming it, should not be quashed, the adjudication was to this purport: “Whereas complaint was made to us by *J. S.* that twenty-four pounds were due in arrear to him from *J. N.* at *Lady-day* last, for rent; and that he would have distrained the goods and cattle of the said *J. N.* in order to obtain satisfaction for the said rent; but that you the said *John Biffex*, in order to prevent this, did, on or about the twenty-seventh, twenty-eighth or twenty-ninth day of *August* last, wilfully and knowingly, aid and assist *J. N.* in fraudulently conveying and carrying his goods and cattle off the estate of *J. S.* and in concealing the same, being under the value of fifty pounds, to wit, two cows, one heifer, and ten hundred weight of cheese, of the value of twenty pounds, contrary to the statute of the 11 *G. 2. c. 19.* whereupon we having, in your presence, examined the witnesses produced by *J. S.* and having heard what was alledged in your defence, do adjudge the complaint to be true; and that the goods and cattle were of the value of twenty pounds; and that you have, by virtue of the said statute, forfeited the sum of forty pounds, being the double value of the goods

“and

“ and cattle carried off to J. S. We there-
 “ fore do adjudge, order and require you the
 “ said *John Biffex*, within three days from
 “ the date hereof, to pay the sum of forty
 “ pounds to J. S.”

The rule was, upon great consideration,
 discharged.

And by *Denison J.*—It has been said; that
 the adjudication is to be deemed a conviction;
 and consequently, that it is bad, because the
 evidence is not therein set out. If the adju-
 dication were to be deemed a conviction, the
 objection, on account of the evidence not be-
 ing set out therein, would certainly be fatal;
 for in the case of *Rex v. Lloyd*, *Mich. 8 G. 2.*
 it was holden; that the evidence must be set
 out in a conviction; and the case of *Rex v.*
Pullen, *Salk. 369.* wherein it is laid down,
 that it is sufficient to state in a conviction,
 that oath was made of the truth of the pre-
 misses, was expressly denied to be law.

But we are of opinion; that the adjudica-
 tion in the present case is to be deemed an
 order; and that it is not necessary to set out
 the evidence, in an order made by one or
 more justices of the peace. In the case of
Rex v. Bathurst, *Mich. 4 G. 1.* an adjudicati-
 on, in a case of bastardy, was holden to be
 an order; and it was likewise holden, that
 although a penalty be inflicted, or a forfei-
 ture be given, by a statute; yet if the word
convict, or some word or words tantamount
 thereto, be not contained in the statute, an
 adjudication upon the statute is not a convic-
 tion. In the statute, upon which the adjudi-
 cation in the present case is founded, neither
 the word *convict*, nor any word or words tan-
 tamount thereto, are contained, and conse-

quently the adjudication ought not to be deemed a conviction.

It has been said; that it does not appear, that the rent was due at the time of carrying off the goods and cattle: but, as it appears that the rent was due at the *Lady-day* preceding, and that the goods and cattle were carried off to prevent a distress, it may fairly be presumed, that the rent continued to be due; and the rather, as the defendant, in case it had been satisfied, had an opportunity of shewing this in his defence before the justices.

It has been said; that it does not appear when the rent became due: but in the case of *Stagg v. Hind*, *Salk.* 139. it was holden; that it is not necessary to alledge this, in the declaration in an action for rent in arrear; and, *a fortiori*, it is not necessary to alledge this in an order of two justices.

It has been said; that the charge in the complaint to the justices, which is, that the goods were carried off on or about the twenty-seventh, twenty-eighth, or twenty-ninth day of *August* last, is not sufficiently certain. As part of the goods might be carried off upon every one of those days, the court, if it were necessary, would intend that to have been the case, for the sake of supporting the order of the justices: but it is not necessary to make such intendment. If a time for prosecuting is limited by the statute creating an offence, the precise day both of the offence, and of the conviction, must, as is laid down in the case of *Rex v. Pullen*, *Salk.* 369. be shewn, that the prosecution may appear to be within the limited time: but if no time for prosecuting is limited by the statute creating an offence, it is not necessary, that the precise day of the offence should be shewn in a conviction; and,
a fer-

a fortiori, it is not necessary to shew this in an order. In the case of *Rex v. Simpson*, Hil. 3 G. 1. which was a conviction for killing deer, the offence was stated to have been committed, between the last day of *April* and the first day of *May*: yet the conviction was holden to be sufficiently certain.

It has been said; that it is not stated in the adjudication, that *J. N.* did carry off his goods and cattle; and that the defendant could not be guilty of aiding and assisting in carrying off the goods and cattle of *J. N.* unless *J. N.* did carry off his goods and cattle. In the case of *Rex v. Monk*, Mich. 13 G. 2. it was stated in a conviction, that the defendant did aid and assist in killing a deer. An objection was made; that it did not appear whom the defendant had assisted; and it was said, that there cannot be an accessory, unless there be a principal. The objection was over-ruled; and by the court, the conviction is in the words of the statute, which has been always holden to be sufficient. It is a mistake, to call the defendant an accessory; for two distinct offences, one of which is killing a deer, the other aiding or assisting in killing a deer, are created by the 3 & 4 W. & M. c. 10. and consequently, the defendant is as much a principal within the meaning of that statute, as if he had himself killed a deer. It may be inferred from this case, that it was not necessary to state, in the adjudication in the present case, that *J. N.* did carry off his goods and cattle: but if that were necessary, it is stated sufficiently; for it is stated, that the defendant did aid and assist *J. N.* in carrying off his goods and cattle; and unless *J. N.* did carry off his goods and cattle, it is impossible, that the defendant could aid and assist him in so doing.

Sheldon *vers.* Foot.

A person, who has been discharged as a fugitive, may be holden to special bail.

UPON a rule to shew cause, why the defendant, who was in custody for want of special bail, should not be discharged upon filing common bail, it appeared; from the duplicate of the defendant's discharge, that he had been discharged as a fugitive, under an act for the discharge of insolvent debtors: but it likewise appeared; that at the time the defendant is in the duplicate said to have been abroad as a fugitive, he was abroad in the course of his trade.

The rule was discharged.

And by *Denison J.*—It has been resolved, at a meeting of all the judges; that the plaintiff is not precluded, in a case like the present; by the production of the duplicate of the defendant's discharge, from shewing, that the defendant was abroad in the course of his trade; and that if this be shewn, the defendant is not entitled to be discharged upon filing common bail.

Waller *vers.* Green, and Three Others.

The court refused to permit the names of two persons to be stricken out of the bail-piece.

UPON a rule to shew cause, why the names of two of the defendants should not be stricken out of the bail-piece, and why an *Exoneretur* should not be entered as to them upon the bail-piece, it appeared; that these two defendants had been excepted to as bail for *J. S.* that thereupon the other two defendants were added as bail for *J. S.* and did justify; and that an action of *Scire Facias* was brought against the four defendants.

The

The court were at first of opinion ; that the names of the two defendants might have been stricken out of the bail-piece, without applying to the court ; for that, as they were excepted to as bail, and did not justify, they ceased to be bail : but the master reported ; that the names of such persons are always continued upon the bail-piece, unless a rule of court be made for striking them out.

The court, upon this report, inclined to make the rule absolute : but, upon its being said, that if this rule should be made absolute, the other two defendants might plead *nul tiel Record* to the action of *Scire Facias*, it was discharged.

A rule was afterwards made ; that proceedings in the action of *Scire Facias* should be stayed, as to the two defendants, who now applied to have their names stricken out of the bail-piece.

Rex *vers.* Fox.

UPON a rule to shew cause, why an order of bastardy, made by two justices of the peace, and an order of sessions confirming it, should not be quashed, one objection to the order of the two justices was ; that there is no adjudication in the order, that the child was born in the parish, for the relief of which it was made.

An order of bastardy quashed as to part, and holden to be good as to the residue.

This objection was over-ruled.

And by the court—It was holden, in the case of *Rex v. Moravia*, *East. 15 G. 2.* and in the case

case of *Rex v. Rook*, (1) *Mich.* 26 *G.* 2. that if it can be collected from an order of bastardy, that the child was born to the parish, for the relief of which it was made, the order is good.

Another objection to the order of the two justices was ; that the gross sum of fifty shillings is ordered to be paid to the churchwardens, for defraying the expence incurred by the parish on account of the lying-in of the mother of the child ; and it was said, that the particulars of the expence ought to have been mentioned.

This objection was over-ruled.

And by the court—As it appears, that the money, ordered to be paid, was expended on account of the lying-in of the mother of the child, the order is good. In the case of *Rex v. Moravia*, wherein a gross sum of money was ordered to be paid, for defraying the expence incurred by the parish on account of the lying-in of the mother of the child, and other incidental charges, the order, although the words, relative to the expence, were more general than the words in the present case are, was holden to be good.

An objection was made to a part of the order of sessions, whereby security was required to be given by the putative father of the child, to perform the order made by the two justices.

This objection was holden to be good.

And by the court—The court of quarter sessions is not impowered, either by the 18 *Eliz.*

(1) Ante Page 61.

c. 3. or by the 6 G. 2. c. 31. to require such security from the putative father of a bastard child.

A rule was made for quashing that part of the order of sessions, which related to the security, and for confirming the order of the two justices, and the residue of the order of sessions.

And by *Denison J.*—In the case of *Regina v. Chaffey*, Lord Raym. 858. an order of bastardy was quashed as to part, and confirmed as to the residue; and the same was done in the case of *Rex v. Massinger*, Trin. 5 G. 2.

Rex vers. the Inhabitants of Duns-Tew.

IN an order of sessions it was stated; that the *Pauper*, and *Goodman* his father-in-law, occupied a farm, at the rent of eighty pounds a year, in the parish of *Duns-Tew*, as partners; that in the year 1747, *Goodman* hired a farm in *Little-Tew*, at the rent of fifty pounds a year; that before *Goodman* entered upon the farm in *Little-Tew*, the *Pauper* asked him, if he depended upon his going with him? To which *Goodman* answered, yes, for I cannot go without you; that *Goodman* and the *Pauper* went with their joint stock from *Duns-Tew* to *Little-Tew*, and resided upon and managed the farm in *Little-Tew* jointly seven years; that the receipts for the rent were given to *Goodman* alone; that, upon the taking of a distress for rent in arrear, *Goodman* alone executed a bill of sale of the stock to the landlord; that when the bill of sale was executed, the *Pauper*, although present, did not claim any interest in the stock; that in the year 1754, the *Pauper* left the farm, and *Goodman* allowed him sixty-

two

A settlement may be gained by occupying a tenement, altho' there be not an actual hiring.

two pounds for his share of the stock ; and that the *Pauper* was soon after removed by an order of two justices to *Duns-Tew*.

The question was, whether the *Pauper* did gain a settlement in *Little-Tew* ?

It was holden that he did.

And by the court—An actual hiring of a tenant is not necessary to the gaining of a settlement ; for as no power is given, by the 13 & 14 C. 2. c. 12. of removing a person, who comes to settle in a tenement, of the annual value of ten pounds, such person is irremovable ; and consequently, he may gain a settlement.

It has been said ; that no credit was given, by the landlord of the farm in *Little-Tew*, to the *Pauper* : but this is not necessary ; for the settlement, which is gained by the occupation of a tenement, of the annual value of ten pounds, is not gained, by reason of the credit given by the landlord to the occupier, but because the legislature have in effect said, that the person of ability to occupy such tenement shall not be removed.

It has been said ; that the *Pauper* was, at the utmost, no more than tenant at will to *Goodman* : but an occupier, as tenant at will, may gain a settlement. In the case of *Cranley v. St. Mary's, Guildford, Hil. 8. G. 1.* it was holden ; that a settlement was gained by occupying a mill two years, in pursuance of an agreement with the lessee of the mill, although there was no assignment of the lease. In the present case, the *Pauper*, in pursuance of an agreement with *Goodman*, did occupy the farm in *Little-Tew*,
jointly

jointly with *Goodman*, several years; and consequently, as the annual value of the farm was fifty-two pounds, the *Pauper* did gain a settlement in that parish.

Kearle qui tam *vers.* Whiteland.

UPON a motion, that the defendant might be allowed to exhibit a petition, to be brought up, in order for his being discharged out of prison, it appeared; that the defendant was charged in execution in *Hilary* term last; that the 2 G. 2. c. 22. upon which statute the defendant's right of petitioning is founded, after having been several times continued, was further continued by the 29 G. 2. c. 28. that the royal assent was not given to the latter statute, until the twenty-ninth day of *May* last; and that by the 8 G. 2. c. 24. it is provided; that no person shall be allowed to exhibit a petition upon the 2 G. 2. c. 24. unless the petition be exhibited before the end of the term, next after such person shall be charged in execution.

The words, *next term*, in a statute, ought to be construed *next term*, in which the thing required can be done.

The question was, whether leave could be given to exhibit the petition?

It was holden, that it might.

And by *Denison J.*—As the last *Easter* term was at an end, before the royal assent was given to the 29 G. 2. c. 28. it was impossible for a prisoner, who was charged in execution in the last *Hilary* term, to exhibit a petition in the *Easter* term. This being so, all the judges, upon conferring together, have been of opinion; that the words the next term in

S f

the

the 8 G. 2. c. 24. ought to be construed the next term, in which it was possible to exhibit a petition; and consequently, that a prisoner, charged in execution in *Hilary* term last, may exhibit a petition in this term. By the *Habeas Corpus* act, the liberty given to a prisoner, of petitioning to be brought to his trial, is confined to the first week of the next term, or to the first day of the next sessions of *Oyer* and *Terminer*, or general goal delivery, after the prisoner was committed; yet it may be inferred, from what is laid down in lord *Aylesbury's* case, *Salk.* 103. that, if the *Habeas Corpus* act be suspended by another act of parliament, a prisoner may petition during the first week of the next term, or upon the first day of the next sessions of *Oyer* and *Terminer*, or general goal delivery, after the expiration of the suspending act.

Rex *vers.* the Inhabitants of Taunton
St. Mary's.

A certificate holden to be at an end, by reason of its not having been resided under for many years.

IN an order of sessions, it was stated; that *Robert Bagg* went, in the year 1702, to reside in the parish of *Taunton St. Mary's*, under a certificate from the parish officers of *Taunton St. Mary's*; that the said *Robert* afterwards returned to the parish of *Taunton St. James's*; that after his return, he had a son *Robert* born in the parish of *Taunton St. James's*; that the *Pauper*, who is the son of *Robert* the son, was born whilst his father resided in the separate house; that after the death of *Robert* the grandfather and *Robert* the father, who both to the time of their deaths resided in the parish of *Taunton St. James's*, the *Pauper* served an apprenticeship in the parish of
Taunton

Taunton St. Mary's; and that the certificate was never delivered up.

The question was, whether the *Pauper* did gain a settlement in the parish of *Taunton St. Mary's*?

It was holden, that he did.

And by *Denison J.*—It has been said; that a certificate does not extend to a grandchild. It has been also said; that *Robert*, the son, was so emancipated from his father's family, by marrying and living separately from his father, that his son, although the court should be of opinion that a certificate does extend to a grandchild, might gain a settlement by serving an apprenticeship in the parish of *Taunton St. Mary's*. It is not necessary, to give an opinion upon either of these points; because we are of opinion, that, as there was no residence under it for so many years, the certificate, although it was not delivered up as it ought to have been, was at an end before the *Pauper's* apprenticeship began, and consequently, that he did gain a settlement in the parish of *Taunton St. Mary's*. If the grandfather had been living at the beginning of the *Pauper's* apprenticeship, he could not, after being so long returned to the parish of *Taunton St. James's*, have gone to reside in the parish of *Taunton St. Mary's*, under the certificate.

Giddings *vers.* Giddings.

Leave given,
after argu-
ment, to
withdraw a
demurrer, and
to reply.

AFTER a demurrer to the defendant's plea had been argued, and the matter stood over for the judgment of the court, a rule was made to shew cause, why the plaintiff should not have leave to withdraw his demurrer, and to reply to the plea.

This rule, no cause being shewn, was afterwards made absolute.

Rennell *vers.* Rennell.

If the condi-
tion of a bond
be sufficient,
performance
must be plead-
ed in the
words of the
condition.

AN action of debt being brought upon a bond, and *Oyer* being prayed, there appeared to be a recital in the condition of the bond; that *William Rennell*, father of the plaintiff and defendant, had by his will bequeathed to the defendant the remainder of an estate for three lives, which the testator had in a certain garden; that he likewise bequeathed to the plaintiff a hogshead of cyder, to be paid him every year that apples enough should grow in the said orchard to make two hogsheads of cyder; and the condition of the bond was, that the defendant should deliver to the plaintiff a hogshead of cyder every year, according to the true intent and meaning of the said will. The defendant pleaded; that upon a certain day he sold his interest in the orchard; that thereupon he agreed to deliver a hogshead of cyder to the plaintiff, every year that apples enough should grow in the said orchard to make two hogsheads of cyder, in satisfaction of the hogshead of cyder bequeathed to him, although the hogshead of cyder, to be delivered by the defendant, should

should be made of apples, which did not grow in the orchard mentioned in the condition of the bond ; that in pursuance of this agreement, the bond was entered into ; and that he had performed the condition of the bond.

Upon a demurrer to this plea, it was holden to be bad.

And by *Denison J.*—If the condition of a bond be in general and affirmative terms, it is sufficient to plead general performance of the condition : but if the condition of a bond be special, performance must be pleaded in the words of the condition. In the case of *Brooks v. Down*, which is cited in the case of *Woodcock v. Cole*, 1 *Sid.* 215. it is laid down ; that in an action of covenant upon an indenture, in which there are divers affirmative covenants, it is sufficient to plead performance generally : but that in an action of debt upon a bond, of which the condition is special, performance must be pleaded of every thing comprised in the condition.

Foster J. and *Wilmot J.* concurred in this opinion ; but, as it appeared, that a hoghead of cyder had been delivered every year, in which apples enough grew in the orchard mentioned in the condition to make two hogheads, the pronouncing of judgment was suspended for a week, in order to give the defendant time to move for leave to amend.

T H E E N D.

I N D E X.

I N D E X

TO THE

C A S E S, Reported or Cited.

The cited Cases are printed in *Italick*; and to such of these, the Authority of which was denied, the Letter D is annexed.

A.	Page.		Page.
A BERY <i>v.</i> Dickenson	250	Battie <i>v.</i> Brown	74
Adams <i>v.</i> Freeman	81	Baxter <i>v.</i> Fairlam	170
Adcock <i>v.</i> Gill	60	Bearcroft <i>v.</i> Burnham Hundred	235
Alderton <i>v.</i> Felixstowe	287	Bennet <i>v.</i> Hart	214
Anonymous, 51, 77, 78, 111,		Berks <i>v.</i> Mason	264
121, 130, 154, 155, 260,		Berwick <i>v.</i> Symonds	196
Archer <i>v.</i> Ellard	109	Bisse <i>v.</i> Harcourt, (D)	153
Arnold <i>v.</i> Squire	81	Booker <i>v.</i> Friend	109
Ashley <i>v.</i> Freckleton	32	Bowen <i>v.</i> Barnett	106
— <i>v.</i> Kinafton	190	Brenan <i>v.</i> Currint	224
Ashworth <i>v.</i> Lord	232	Brock <i>v.</i> Ewers	203
Affer <i>v.</i> Finch	251	Brooks <i>v.</i> Down	307
Atherley <i>v.</i> Evans	369	Brownsmith <i>v.</i> Denny	295
Athol, Duke of <i>v.</i> Wilding	47	Bruce Lord's Case	248
Aylesbury Lord's Case	314	Buth <i>v.</i> Ralling	289
B.		Buxendon <i>v.</i> Sharp	282
B AGG's Case, (D)	248	Buxton <i>v.</i> Bateman, (D)	32
Baines <i>v.</i> Blackburn	216	C.	
Bank of England <i>v.</i> Wait	97	Callaghan <i>v.</i> Pennell	96
Barham <i>v.</i> Netherfall	281	Carey <i>v.</i> Humot	9
Barnard <i>v.</i> Reason	236	Catling <i>v.</i> Bowling	80
		Catling <i>v.</i> Bowling	120
		T t	
			Clarke

INDEX TO THE CASES,

	Page.		Page.
Clarke v Darby	43	Ford v. Gainer	207
—— v. Glas	234	Fox v. Cope	154
Clemens v Reynolds	25	Furnis v. Hallam	240
Collins v Renison	138	G.	
Commings v Oakhampton, Mayor	45	Gally v Clegg	47
Coote v. Howell	30	Gardiner v. Atwater	265
Cope v Marshall	234	Gibson v. Linly	256
—— v Marshall	285	Giddings v Giddings	316
Cordwell v. Mackarell	322	Goddard v. Law	220
Coupland v Frinbo v	245	Godfrey's Case	184
Cranley v St. Mary's, Guildford	312	Golding v Crowle	1
Cranston v Clarke	78	Gray's Case	57
Crozier v Stork	28	Gregson v. Heather	55
Cullitord v Thurstout	303	Green v. Hassel	233
Cunningham v. Johnson	19	—— v. Weston	209
D.		Griffith v. Griffith	83
DAlston v. Hartcliffe	233	—— v. Hollier	294
Davison v. Davison	95	—— v. Walker	54
Danbuz v. Pender	59	—— v. Williams	56
Dawney v. Dee, (D)	32	—— v. Williams	87
Dennis v. Fletcher	207	Grove v. Hart	33
Dodsworth v. Anderson	193	Grub v. Smithers	120
Doyley v. Pittsow	221	Gwynne v. Poole	82, 83
Drummond v Duke of Bolton	243	H.	
Dryden v. Langley	285	Hallet v. Hodges	29
E.		Halfey's Case, (D)	30
Ederton's Case	129	Hamilton, Dutcheff's Case	127
Eliot v. Cheval	222	Hampson v Adshead	91
Emmerton v. Cavendish	158	Hankey v. Wilson	223
—— v Haskins	53	Harbin v. Green	57
Esplin v. Smollet	208	Harding v. Stafford	133
Esplin v. Smollet.	301	—— v. Willkin	120
F.		Hargran v. Wood	184
Fane's Case	186	Harris v. Mitchell	99
Fazakerly v. Wiltshire	255	Harris v. Wakeman	254
Finch v Duddin	150	Harrison v. Alexander	156
Fisher v Smerville	300	Hawkins v. Easterbrooke	115
—— v. Wegg	68, 70	Hayley v. Grant	63
Foley v. Langhorne	50	Haywood v. Davis	234
		Herbert	

REPORTED OR CITED.

	Page.		Page.
Herbert v. Williams	24	Lewis v. Wallis	13
Hesketh v. Gray	185	London, City of, v. Manley	255
Hewitt v. Penny	99	Lynne v. Moody	184
Hiliard v. Cox (D)	83	M.	
Hollidge v. Hungerford	256	MACLISH v. Ekins	73
Holt v. Burleigh	296	Madox's Case	137
Honiton v. St. Mary Axe	287	Mariborough, Duke's Execu-	
Hook v. Moreton	137	tors v. Widmore	97, 235
Hord v. Stoke.	67	Maxwell v. Sharp	187
Howard v. Cheshire	250	May v. King	271
— v. Cheshire	260	Maynard v. Hopkins	46
Howell v. Clarke	97	Methuen v. Marten	107
Howe's Case	125	Michael v. Alestree	41
Huith v. Sheldon	27	Mills v. Gregory	127
Hussey v. Welby	218	— v. Long	136
I.		Mitward v. Ingram, (D)	271
JACKSON v. Gabree (D)	149	Mitchell v. Robinson	240
Jennings v. Vandeputt	222	Moir v. Munday	181
Jennings v. Wilson	103	Moore v. Fernihaugh	48
Innholders Company v.		Mordecai v. Solomon	172
Gledhill	274	Mosely v. Warburton	86
Jones v. Bishop	64	Murray v. Wilson	17
K.		N.	
KEARLE v. Boulter	191	NEVIL v. Bates	63
Kearle v. Whiteland	313	Nisbett v. Griffith	97
Kelly v. Devereux	59	Newland v. Osomond	93
Kemp v. Mackarill	130	Newton v. Swymmer	43
Kennedy v. Kennedy	99	Norton v. Voules	180
Kennon v. Owen	194	O.	
Kenrick v. Taylor	31	ONSLOW v. Booth	19
Kirk v. Broad	7	Opy v. Addison	137
L.		P.	
Lancashire v. Killingworth	189	PAGE v. Harwood	225
Lane v. Cotton	42	— v. Round	203
Laughter's Case (D)	244	Pantfune v. Marshall	162
Launder v. Cripps	245	Pawson v. Scott	76
Lawrence v. Boswell	100	Pearce v. Davy	293
Laycock v. Garforth	6	Perkins v. Smith	40
Leathley v. Webster	251	Perry v. Nicholson	240
Lee v. Wallis	262	Peter v. Stafford	301
Leigh v. Brace	68	Pike v. Corbyn	78
	T t 2		Pilkington

INDEX TO THE CASES,

	Page		Page.
Pilkington v. Hamlin	153	Rex v. Bridges	72
Philips v. Bury	86	— v. Bristow	138
— v. Fowler	291	— v. Brookes	167
Pitts v. Miller	149	— v. Buckingham Inhabi-	
Portman v. Okeden	179	tants	11
Price v. Griffith, (D)	48	— v. Burges	128
Purefoy v. Rogers	283	— v. Burges	169
Q.		— v. Carmarthen Burgeses	79
QUILTER v. Newton	177	— v. Chapman	203
R.		— v. Chatley	152
READ v. Charnley	50	— v. Collyer	44
— v. Wilmot, (D)	82	— v. Corbett	267
Regina v. Barnaby	205	— v. Curle	279
— v. Chaffey	311	— v. Davies	241
— v. Jones	205	— v. Davis	163
— v. Maccarty	206	— v. Davis	276
Rennell v. Rennell	316	— v. Day	202
Rex v. Abington, St. He-		— v. Doncaster Mayor	37
len's Overseers	118	— v. Doncaster Mayor	39
— v. Addington	259	— v. Dorny	142
— v. Alderton	280	— v. Driffeld	146
— v. Ashton	159	— v. Duns-Tew Inhabi-	
— v. Barton	146	tants	311
— v. Bathurst	225	— v. Dyke	20, 196
— v. Bathurst	305	— v. Faking Inhabitants	88
— v. Beaumont	278	— v. East Lidford Inhabi-	
— v. Bedell	76	tants	301
— v. Bennett	102	— v. Farwell	124
— v. Bennett	169	— v. Fittleworth Inhabitants	124
— v. Bennett	247	— v. Fox	309
— v. Berkley	123	— v. Furser	90
— v. Berkshire Justices	160	— v. Gardiner	16
— v. Biffex	304	— v. Goodall	129
— v. Blower	119	— v. Goodman	19
— v. Blunt	102	— v. Govers	206
— v. Botolph St. Inhabi-		— v. Granborough Inhabi-	
tants	198	tants	3
— v. Botwright	147	— v. Greene	281
— v. Bow	75	— v. Grew	249
— v. Boys	108	— v. Griffith	253
— v. Boys	143	— v. Haddock	20
— v. Bradenham Inhabi-		— v. Hanson	229
tants	285	— v. Harrifon	110
		Rex	

REPORTED OR CITED.

	Page.		Page.
Rex v. Haslemere Corpora- tion	106	Rex v. Nottingham, St. Pe- ter's Inhabitants	287
— v. Hellier	252	— v. <i>Norton Inhabitants</i>	199
— v. Heydon Burgeffes	208	— v. <i>Orford Mayor</i>	55, 147
— v. High and Low Bi- shopside Inhabitants	231	— v. Owen	30
— v. <i>High and Low Bishop- side Inhabitants</i>	288	— v. <i>Peck</i>	89
— v. Hood	161	— v. <i>Phillips</i>	263
— v. Hord	176	— v. Ponsonby	245
— v. Horsley Inhabitants	228	— v. Powell	229
— v. Jermy	47	— v. <i>Pullen (D)</i>	305
— v. Ilam Inhabitants	8	— v. <i>Pullen</i>	306
— v. <i>Jones</i>	102	— v. Purdue	42
— v. Jopson	27	— v. Read	165
— v. Kendrick	114	— v. <i>Redding</i>	62
— v. Kingswood Inhabi- tants	283	— v. Redman	303
— v. Laurence	218	— v. Roch	233
— v. Lawson	215	— v. Rollo	158
— v. Lediard	6	— v. Rook	61
— v. Lediard	112	— v. <i>Rook</i>	310
— v. Lediard	242	— v. Rye Justices	25
— v. Lewis	205	— v. Scarborough Corpo- ration	105
— v. <i>Lewis</i>	253	— v. Severn	208
— v. <i>Lloyd</i>	305	— v. Sheppard	65
— v. Lockerly Inhabitants	9	— v. <i>Sherborne Inhabitants</i>	171
— v. <i>Loggen</i>	50	— v. <i>Silton Inhabitants</i>	228
— v. Marden Inhabitants	9	— v. Simons	34
— v. Marwood Inhabitants	268	— v. <i>Simpson</i>	307
— v. Masters	122	— v. Smith	98
— v. Middlesex Justices	148	— v. <i>Smith</i>	302
— v. <i>Minchinghampton In- habitants</i>	22	— v. <i>Sowerby Inhabitants</i>	201
— v. <i>Monk</i>	307	— v. Spencer	14
— v. <i>Moravia</i>	61, 309, 310	— v. Stanley	139
— v. <i>Munoz</i>	206	— v. Stephens	257
— v. <i>Newcastle Mayor</i>	39	— v. <i>Steyning Inhabitants</i>	92
— v. Newland	96	— v. <i>Stirling</i>	174
— v. Newtham	211	— v. Sudbury Inhabitants	200
— v. Nichols	229	— v. Surry Justices	144
— v. Nottingham Justices	216	— v. Swimmer	103
— v. Nottingham Mayor	36	— v. <i>Talbot</i>	129
		— v. Tardebigg Inhab.	100
		— v. Taunton, St. Mary's Inhabitants	314
		Rex	

INDEX TO THE CASES, &c.

	Page.		Page.
Rex v. Tew	50	Tilt v. Bartlet	126
— v. Tew	195	Tomkins v. Gratton	266
— v. Tucker	263	Todd v. Dodd	5
— v. Welbeck Inhabitants	148	Tooker v. Duke of Beaufort	297
— v. Wannop	142	Tourville v. Nash	76
— v. Westmoreland Jus- tices	282	Tourville v. Pony	172
— v. West Shefford Inha- bitants	2	Tubb v. Tubb	58
— v. Whitchurch Inhabi- tants	134	Turner v. Cordwell	46
— v. Wild	60	Turner v. Davis	100
— v. Williams	140	Tyler v. Browning	4
— v. Williams	145	U.	
— v. Wyatt	180	UPpendale v. Lightfoot	217
— v. Yarmouth Inhabi- tants	170	W.	
Reynolds v. Gray, (D)	222	WAganor's Case, 182, 183,	255
— v. Reynolds	163	Wailer v. Green	308
Ribout v. Wheeler	166	Warnhouse v. Thrustout	49
Richards v. Holditch	13	Watkins v. Hybert	48
Rigden v. Valier	69, 71	Watkins v. Parry	117
Ruffel's Case	125	Watson v. Jackson	32
S.		Watson v. Jackson	104
SAVIL v. Roberts	2	Watson v. Mitchell	222
Savery v. Serle	150	Weaver v. Chandler	7
Saxby v. Kirkus	116	Webb v. Paternoster	3
Say v. Lord Biron	63	Wells v. Osomond	127
Schomberg v. Nash	113	Weston v. Donelly	273
Sheldon v. Foot	308	Wheatley v. Hall	272
Sherman's Case	94	Whitmore v. Rock	299
Simpson v. Ward	151	Wicker v. Woodfall	49
Skinner v. Gunton	163	Widmore v. Clark	121
Smith v. Huggins	264	Wigan v. Holmes	110
— v. Jones (D)	48	Williams v. Williams	219
Spratt v. Frederick	51	Wilmot v. Butler	149
Stagg v. Hind	306	Wilson v. Wymonfold	268
Still v. Rogers	25	Wingfield v. Stratton	15
Still v. Still	6	Wood v. Lake	3
Stonehouse v. Vowell	88	Wood v. Lord Biron	62
T.		Wright v. Macavoy	12
THames, Earl v. Snatchbull	215	Wyndham v. Bowen	141
Thomlinson v. Brown	215	Y.	
Thurmer's Case	168	YATES v. Carlisle	197
		Yeomans v. Bradshaw	84
		Young v. Lynch	84

INDEX

I N D E X

TO THE

PRINCIPAL MATTERS.

A.

Action upon the Case.

1. **T**HE owner of a house, although he be not in possession, may maintain an action upon the case, for stopping up the windows of the house, Page 216

Administrator and Letters of Administration.

1. *Tout temps prist*, the manner of pleading it by an administrator, 18
2. The right of granting letters of administration does not depend upon the dying within a diocese, but upon the leaving of goods therein. 96
3. Letters of administration may be acted under, until they are revoked. 99

4. If letters of administration are revoked, after execution has been executed upon a judgment, an *audita querela* lies, Page 100

Agreement.

1. The person who has agreed to keep a chariot in repair, is bound to take notice, when the chariot is in want of repair, 114

Affirmation.

1. The affirmation of a Quaker is not admissible, against a person who is charged criminally, 72
2. The affirmation of a Quaker is not admissible, to exculpate himself from a criminal charge, 75

Amend-

INDEX TO THE

Amendment.

1. An amendment is not in the general to be permitted after two terms, *Page 99*, 236
2. An amendment, by which the *Venue* was changed, permitted after two terms, 294
3. An amendment permitted after two terms; because the time for bringing a new action was expired, 235
4. After a cause was made a *remanet*, an amendment was permitted, 285
5. An amendment permitted, after a demurrer had been argued, and the matter stood for the consideration of the court, 316
6. After a demurrer had been argued, and the justices had given their opinions, judgment was suspended for a week, in order to give the defendant time to move for leave to amend. 317
7. An amendment of the issue and *nisi prius* roll was permitted, 76
8. An amendment of a *distringas*, by adding a *teste*, was permitted, 62
9. An amendment of a *feri facias*, by adding a *teste* was permitted, 12
10. An amendment of the *transcript* of a record of an inferior court, was permitted, 59
11. An amendment of a matter which was a discontinuance, was permitted with consent, 46
12. An amendment, by which a new right of action would have been alledged, was refused, 235

13. An amendment of an order of sessions was refused, *Page 285*

Amotion.

1. The power of amotion is incidental to a corporation. 38, 249
 2. The power of amotion cannot be exercised by a part of a corporation, unless it be vested in such part, 38
 3. Non-residence in a borough, is not good cause of amotion, 39
 4. Absence many years from a borough, is good cause of amotion, 39
 5. A total desertion of the duty of an office is good cause of amotion, 39
- See information in the nature of a *quo warranto*, 4.

Apprenticeship.

1. An apprenticeship is determined by the death of the master or apprentice, 88

Attachment.

1. An attachment may be awarded in the first instance, for speaking contemptuous words of the court, 48, 114.—For the non-payment of costs which have been taxed, 48.—For a *rescous* returned by a sheriff, 121
 2. An attachment against a peer, for disobedience to a process of the court, 50.—Against the chancellor to a bishop for not returning a writ directed to the bishop, 50.—Against an attorney for neglecting his client's cause. 51
1. The

P R I N C I P A L M A T T E R S.

Attorney.

1. The attorney in a cause cannot be changed without leave of the court, during the cause, 218: But a new attorney may, without leave of the court, sue out a *scire facias* upon a judgment, Page 218
2. It is the duty of an attorney, to proceed in a suit commenced upon the credit of a client, although the client neglects to bring him money, 173
3. An attorney is answerable to his client for exceeding his power, 259 —For an injury sustained by his neglect, 51, 172.—For an injury sustained by his misbehaviour, 169
See Attachment, 2.
4. An attorney is bound, upon the payment of what is due from a client, to re-deliver a deed to the client, 125
5. The bill of an attorney for making conveyances may be taxed, 233
6. An attorney is not obliged to pay for the plea, in a cause wherein he is plaintiff, 77
7. The *Venue* cannot be changed, upon the common affidavit, in a cause wherein an attorney of the court is plaintiff, 153, 180

Award.

1. An award is good, although it was made by an umpire, chosen by the arbitrators before the time for their making an award was expired, 222
2. An award, by which costs are awarded generally, is good, 240

3. An award made by an umpire was set aside; because the right of nominating the umpire was tossed up for by the arbitrators, Page 99

Bail.

1. Special bail is not necessary in an action of debt upon a judgment, if there were special bail in the original action, 43, 161
2. A person who has been discharged as a fugitive, may be holden to special bail, 308
3. An affidavit, to explain a positive affidavit, that above the sum of ten pounds is justly due to the plaintiff, was not permitted to be read, 54
4. An affidavit, that the defendant is indebted to the plaintiff in the sum of one hundred pounds, upon the penalty of a bond, is not sufficient to hold to special bail, 109
5. An affidavit, that the defendant is indebted to the plaintiff in the sum of twenty pounds, upon breach of articles, is not sufficient to hold to special bail, 109
6. If one person be excepted to as bail, and another be added, the name of the former may, with leave of the court, be stricken out of the bail-piece at any time before an action of *scire facias* is brought, 58, 309.—And after it is brought, the proceeding, as against him, may be stayed, 309
7. If the principal be rendered by the bail, an *exoneretur* may be entered upon the bail-piece, 8
U u
8. The

INDEX TO THE

8. The recognizance entered into by bail, upon removing an indictment, is to be discharged, in case the defendant be acquitted, Page 18

9. The recognizance entered into by bail is, in strictness of law, forfeited, upon the return of *non est inventus* to a *capias ad satisfaciendum*, 121

10. In an action upon a bail bond, the arrest is not traversable: But the issuing of the writ is, 117

Bank-note.

1. The property in a bank-note passes by the delivery of the note, in the course of trade, for a valuable consideration, 74

Bastard.

1. The child of a married woman may be a bastard, although her husband be within the four seas, 62

2. A married woman may be admitted to prove, that a child born of her body was begotten by a man not her husband: but she cannot, to prove that her husband had no access to her, 62

3. An express adjudication, that the bastard was born in the parish, for the relief of which the order is made, is not necessary in an order of bastardy, 61, 310

4. An order to pay a gross sum, for the expences incurred by a parish on account of a bastard, is good, 310

5. An order of Sessions, requiring the putative father of a bastard to give security for per-

forming an order of two justices, is not good, Page 110

6. The putative father of a bastard may take it from the parish, and maintain it himself, 94

Bond.

1. The intention of the parties to a bond is to be regarded, in construing the condition of the bond, 244

2. The penalty of a bond is not always saved, although the performance of one part of a disjunctive condition be rendered impossible by the act of God, 244

3. If an obligor undertakes for the act of a stranger, the penalty of the bond is not saved by the refusal of the stranger to do the act, 187

4. If an obligor undertakes for the resignation of a living, it is incumbent upon him to procure the acceptance of a resignation by the ordinary, 187

5. If the condition of a bond be, that an apprentice shall not absent himself from his master's service, the whole penalty may be recovered, in case the apprentice do absent himself, 116

6. If the condition of a bond be to pay divers sums of money by instalments, an action lies upon the first failure of payment, 30

7. If the condition of a bond be general, it is sufficient to plead the performance generally: But if it be special, performance must be pleaded in the words of the condition, 317

Bribery.

PRINCIPAL MATTERS.

Bribery.

1. Giving a person money to forbear to vote, is an offence within the meaning of the 2 G. 2. c. 24. although there be not a forbearing to vote

Page 282

2. The person who has received a bribe, is a competent witness, to prove the giving of the bribe in an action upon the 2 G. 2. c. 24. 290, 291

By-law.

1. A by-law may be good in part, 256
2. A by-law made by a corporation, inflicting a penalty upon such members of the corporation as do not pay obedience thereto, is good 275
3. A by-law, for restraining the number of electors, is good, 263
4. A by-law for restraining the number of persons, out of whom an election may be made, is void, 263
5. If a by-law be uncertain, or contrary to a statute, it is void, 252
6. A by-law, giving a power to distrain for a penalty due by custom is good, 183.—But a by-law whereby a power is given of selling the goods distrained for a penalty, is void, 263
7. If an action be brought upon a by-law, whereby a penalty is inflicted, for not taking the livery of a company, it must be alledged in the declaration, that the company have a livery, 275

Cafe reserved.

1. The court cannot, upon a case reserved take into their consideration any question, except that which is submitted by the case, Page 5

Certiorari.

1. The attorney-general may move for a *Certiorari*, to remove an indictment for not repairing a highway, without an affidavit. 128
2. A *certiorari* does not lie, for removing a warrant of a justice of the peace, 7

Cheat.

1. A indictment, for affirming to be a merchant, and producing commissions as a merchant, was holden to be good, 206
2. The court refused to quash an indictment against a married woman, for affirming herself to be a single woman, 209
3. An indictment for delivering one bushel and three pecks of coals for two bushels, was quashed, 146
4. An indictment for selling an inferior kind of gum, for gum *seneca*, was quashed, 205
5. An indictment for selling bull beef, for steer beef, was quashed, 147

Church.

1. It is the province of the ordinary, to regulate every thing in a church, which, relates to the

U u 2

INDEX TO THE

- the exercise of divine service,
Page 178
2. A faculty may be granted by the ordinary, for erecting a gallery in a church, 178
 3. The right of freehold in a pew in a church, does only extend to the sitting therein, 177
 4. In an action against a stranger, for being disturbed in the enjoyment of a pew in a church, it is not necessary for the plaintiff to allege, or prove, that he has repaired, or is bound to repair the pew, 32
 - on of an offence in a conviction upon the statute must be particular, Page 204
 5. The authority to convict must be shewn in a conviction. 129
 6. The evidence must be set out in a conviction, 305
See Forcible Entry, 3.

Coroner.

1. The court refused to quash an inquisition before a coroner, whereby it was found, that only the near fore-wheel of a waggon did move to the death of a man, 250

Costs.

- ### Client.
1. A client is bound by the act of his attorney: But the attorney is answerable for an improper act, if it be injurious to the client, 259
- ### Conviction.
1. A conviction cannot be, unless the proceedings be against a person, 7
 2. An act done, by virtue of a statute, is not to be deemed a conviction, unless the word *convict*, or words tantamount thereto, are contained in the statute, 305
 3. If a time for prosecuting be limited, by a statute creating an offence, the precise day, both of the offence, and of the conviction, must be shewn in a conviction: But if no time be limited, it is not necessary to shew either, 306
 4. Although the words of a statute be general, the description of an offence in a conviction upon the statute must be particular, Page 204
 5. The authority to convict must be shewn in a conviction. 129
 6. The evidence must be set out in a conviction, 305
See Forcible Entry, 3.
- ### Coroner.
1. The court refused to quash an inquisition before a coroner, whereby it was found, that only the near fore-wheel of a waggon did move to the death of a man, 250
- ### Costs.
1. A rule was made, for staying the proceeding in an action for the mesne profits, brought in the name of the nominal plaintiff in the action of ejectment, until security should be given for the costs in the present action, 78
 2. The relator, in an information in the nature of a *quo warranto*, is liable to costs, for not proceeding to trial pursuant to notice, 130
 3. If a feigned issue be ordered by a court of law, the costs follow the verdict, 25, 253.
—But only the costs subsequent to the ordering of the issue are to be paid, 25, 250, 253
 4. If a cause, made a *remonet* at one assize, be tried at another, the costs of both assizes follow the verdict, 272
 5. If a plaintiff proceed after having taken money out of court, he

PRINCIPAL MATTERS.

he is not, although he afterwards discontinue the action, entitled to costs to the time of bringing in the money *Page* 196

6. The plaintiff is not entitled to full costs, for an injury done to a personal chattel, if the injury were consequential, 92

7. A certificate may be upon the 43 *Eliz. c. 6.* if an interest in land be not directly in question, 251

8. If there be a certificate upon the 43 *Eliz. c. 6.* the plaintiff is not entitled to any costs under the 4 *Ann. c. 16.* 261

9. If a plaintiff be liable to costs, in case the debt to be recovered do not amount to forty shillings, he is liable, in case he do not obtain a verdict for forty shillings, 274

10. If costs are due upon a judgment, or under a rule of court, in an action by or against a husband and wife, the wife in case she survive her husband, is entitled to the costs, 126

Covenant.

1. If a covenant be to pay one of two things, at the election of the payee, and the breach assigned in an action of covenant be, that neither of the two was paid, it is not necessary, for the plaintiff to allege in his declaration, that he made an election, 232

2. In an action upon a covenant, that an apprentice shall not absent himself from his master's service, the receiving of the apprentice after an ab-

sence, may be given in evidence in mitigation of damages, *Page* 116

Court of Delegates.

1. A court of delegates, sitting in *Ireland*, under a commission from the Lord Chancellor of *England* is to be considered as an *English* court of justice, 258

2. A sentence of excommunication may be given by a court of delegates, 258.—And the person excommunicated may be absolved by the same court, 259

Court of Quarter Sessions.

1. An indictment found at a quarter sessions, for exercising the office of a bailiff of a corporation, without having taking the oath of allegiance, and received the sacrament, was quashed for want of jurisdiction, 138

2. An indictment found at a quarter sessions for perjury, was quashed for want of jurisdiction, 278

3. A *mandamus* was awarded, for a court of quarter sessions to hear an appeal to an order of two justices, 282

See Order of sessions, 1, 2, 8.

Custom.

1. A custom of a city, which extends beyond the liberties of the city, is good, 255

2. A custom of a city, to exclude foreigners from exposing goods to sale in the city, is good, although it do not except

INDEX TO THE

cept the exposing of victuals to sale, 182.—Or although it do not except the exposing of goods to sale in fairs or markets,

Page 255

3. A custom, by which the person who exposes goods to sale in a city is liable to pay a reasonable penalty, is good, 182
4. A custom, to distrain for a penalty due by custom, is good, 1, 2 —But a custom, to distrain various goods of great value for a small penalty due by custom, is void, 183
5. If the penalty, for which a distress may be made, is to be paid to the two bailiffs of a corporation, one of the bailiffs may distrain for it, 183
6. Although one custom be the consideration of another, the former custom is not to be considered as a parcel of the latter, 57, 58

Debt.

1. A simple contract debt is not extinguished, by being allowed in a settled account 270
2. An action of debt upon a judgment ought to be discouraged, 44, 161
3. Leave was given to imparl in an action of debt upon a judgment, until a writ of error brought up on the judgment should be determined, 44

Detaining.

1. The general right of a person, to detain a thing which has been delivered to him, is waived by a special agreement, 224

Ejectment.

1. The notice to appear to a declaration in an action of ejectment, must be to appear in the term next to that, of which the declaration is,

Page 49

2. The tenant in possession cannot appear to a declaration in an action of ejectment, after the time allowed by the common rule for appearing is expired, 151

3. Judgment cannot be signed, in an action of ejectment, against the casual ejector, until the afternoon of the fifth day after the end of the term, of which the declaration is,

303

Escape.

1. An information not permitted to be filed against a goaler, for suffering a prisoner to go at large, 145

Evidence.

1. An exemplification of a record of the court of exchequer, under the seal of that court, is admissible evidence, 298

2. Evidence, that part of the consideration-money mentioned in a conveyance, was not received for the land conveyed, is admissible, 210

3. Evidence, which is contradictory to an allegation under a *Scilicet*, may be admissible, 221

4. Parol evidence, which is inconsistent with a written agreement, is not admissible, 189

5. If several issues are to be tried at

P R I N C I P A L M A T T E R S.

at the same time, the evidence as to every issue, may be given separately, *Page 177*

6. It is not necessary to give evidence, as to any thing alledged in the pleadings, the allegation of which was not necessary, *14.*

7. After a conviction upon an indictment, an affidavit cannot be received in mitigation of the punishment, as to any fact of which evidence might have been given upon the trial. *233*

8. A rule for inspecting books, in order to obtain evidence, may be applied for, as soon as a rule is made to shew cause, why an information should not be filed. But such a rule cannot be applied for in the case of a *mandamus*, until there is a return to the *Mandamus*, *228*

9. A rule was made, in the first instance, for producing a book belonging to a corporation, at the trial of an information in the nature of a *quo warranto*. *77*

10. A rule, for inspecting the books of the commissioners for licensing hackney coaches, was refused, because the commissioners were not parties to the action, *250*

Executory Devise.

1. A devise in a will can never take effect as an executory devise, if it can take effect as a remainder, *238*

F.

Feigned Issue.

1. If a feigned issue be ordered by a court of law, the costs follow the verdict, *25, 253.*
—But only the costs subsequent to the ordering of the issue are to be paid, *Page 25, 230, 253*

Fieri Facias.

1. A *fieri facias* cannot be sued out against an executor or administrator, until two writs of *scire facias* have been sued out, *266*

Fine.

1. Large fines have been set upon the persons convicted upon indictments for public nuisances, because the defendants refused to go before the master, *20, 196*

2. The court refused to set a large fine, upon two persons convicted upon an indictment for an assault, although they refused to go before the master, *196*

3. It is in one case said, that the court will not, for the time to come, set a large fine in any case, upon a person convicted upon an indictment, although he shall refuse to go before the master, *231*

Forcible Entry.

1. An indictment for a forcible entry is good at the common law, although it be not alledged, that the entry was with a strong hand, *227*

2. An

INDEX TO THE

2. An indictment for a forcible entry is not good, unless the estate of the person, upon whom the entry was made, be shewn, *Page* 143, 225
3. A conviction for a forcible entry is not good, unless there be an adjudication therein, that the person convicted shall be committed until the fine set is paid, 176

Forgery.

1. A forgery detected, by measuring the writing, 132

Fraud.

1. The court will never presume, that an action is brought with a fraudulent design, 295

G.

Game.

1. A gun is not an engine for killing the game, within the meaning of the 5 *Ann. c. 14.* unless it have been used for killing game, 16
2. A poulterer is not such a chapman, as is liable to a penalty, for having a hare in his possession, 192
3. In an action for the penalty given by the 9 *Ann. c. 25.* for exposing a hare to sale, it is sufficient to alledge in the declaration, that the defendant had a hare in his possession, 65

H.

Highway.

1. If a highway be not much wanted for the use of the public, an indictment will not lie, for suffering it to be out of repair, *Page* 93
2. If there be two villis in a parish, it is not necessary, in an indictment for a nuisance in the parish, to shew in which vill the nuisance is, 119
3. In an indictment for a nuisance in a way, it is not necessary to alledge, that the way is common for all the king's subjects, 168
4. In an indictment for a nuisance in a highway, it is not necessary to alledge, that it has, from time beyond memory, been a highway, 67
5. It is not necessary, to set out the length or breadth of a nuisance in a high way, in an indictment for the nuisance, 98, 167, 302
6. If it be alledged, in an indictment for obstructing a highway, that all the king's subjects have a right of passing in the highway on foot, on horseback, and in carriages, and only a right of passing on foot is proved, the defendant ought to be acquitted, 169
7. The court will not permit an information to be filed, for suffering a highway to be out of repair, unless it be a case of enormity, and it appear, that a grand jury have grossly misbehaved, in not finding a bill of indictment, 93

Husband

P R I N C I P A L M A T T E R S.

Husband and Wife.

1. A wife ought to join with her husband, in an action for saying of the wife, that she keeps a bawdy-house, *Page 153*
2. If there be judgment in an action against husband and wife, the wife may be taken in execution without the husband, *150*
See Costs, 10.

I.

Indictment.

1. The power of quashing an indictment is entirely discretionary, *27, 158, 161*
2. A motion to quash an indictment may be made upon the last day of a term, *65*
3. An indictment may be quashed after it has been pleaded to, *158*
4. An indictment was quashed, because the addition of the person indicted followed an *otherwise called*, *280*
5. The court refused to quash one indictment, wherein a breach of the peace, in consequence of an assembly to disturb the peace, was charged, *27*.—Another, wherein the charge was, knocking violently at the outer door of a dwelling-house, *161*.—Another wherein the charge was, that the defendant, a man, did piss in a room, in the presence of two women, *158*
See Cheat, 2, 3, 4, 5.

6. If there be two villis in a parish it is not necessary to shew in an indictment, of which vill the defendant is, *Page 119*
See Highway, 2.
7. The words, force and arms, in an indictment, do always mean actual force, *227*
8. an indictment which concludes against the form of a statute may be good at the common law, although it be not good upon the statute, *226*
9. Although the words of a statute be general, the description of an offence, in a conviction upon the statute must be particular, *204*
10. A view cannot be had in an indictment without consent, *304*
11. If there be only one count in an indictment, unless the whole charge therein be proved, the defendant ought to be acquitted, *169*
12. If there be a general verdict of guilty upon an indictment, which contains several counts, judgment must, if any one count is good, be given for the king, *228*
See Cheat, 1.—Court of quarter-sessions, 1, 2.—Evidence, 7.—Highway, 1, 2, 3, 4, 5, 6.—Innuendo, 1.—New Trial, 4.—Order, 9, 10.—Parish Officer, 2, 3.

Information.

1. A motion for an information is not to be made upon the last day of a term, *241*

INDEX TO THE

See Escape, 1.—Highway, 7.—
Justice of the Peace, 2, 3.—
Libel, 1, 2.—Parish Officer,
4.

Information in the nature of a *Quo Warranto*.

1. An information in the nature of a *quo warranto* lies for usurping a franchise, although there have been a surrender of the franchise, Page 239
2. Several matters cannot be pleaded, in an information in the nature of a *quo warranto*, 96
3. Judgment of *Ouster* ought not to be given, in an information with the nature of a *quo warranto* at the common law, 247
4. Judgment of *Ouster* ought not to be given, in an information in the nature of a *quo warranto* upon the statute, against a person who has not been sworn into a franchise, 247.—or against a person, who has *ipso facto* forfeited his franchise, 248.—Or against a person, who came lawfully into the possession of a franchise, unless there have been a previous amotion of such person from his franchise, 248

See evidence, 9. Highway, 7.
Innuendo, 1. New Trial, 3.

Innuendo.

1. An innuendo may explain or apply preceding words: but it cannot add to, enlarge, or change the sense of the preceding words in a declaration, in an indictment, or in an information, 281

Judge.

1. It is not a good objection to a judge, that the corporation, of which he is a member, is interested in the cause, Page 255
2. The proceedings in a cause are not stayed by the summons of a judge: But a judgment was set aside, because, on all the circumstances of the case, it was very improper to sign it pending the summons of a judge, 166

Judgment.

1. A judgment, signed in less than twenty-four hours, because the issue is not paid for, is irregular, 9
2. A judgment to ask pardon, and to publish an advertisement, is illegal, 44
3. If a verdict be incomplete, no judgment can be given upon it, 36
4. Judgment, as in the case of a nonsuit, ought not to be given, unless all the defendants apply for it, 23, 104
5. Judgment, as in the case of a non-suit, may be given in an action *qui tam* for a penalty, if no part of the penalty be given to the king, 22
6. Judgment, as in the case of a nonsuit, may be given in a traverse of the return to a *mandamus*. 110
7. Judgment, as in the case of nonsuit, was given, where the cause was not tried, by reason of a mistake in the declaration, 75

See

P R I N C I P A L M A T T E R S .

See Debt, 2, 3.—Ejectment, 3.
—Indictment, 12.—Information in the nature of a *quo warranto*, 3, 4.

Juror.

1. It is not a good objection to a person on the pannel, that the corporation, of which he is a member, is interested in the cause, Page 255
2. The persons, upon the pannel for a special jury, ought to be summoned a sufficient time before the trial is to come on, 30.—Only twelve persons ought to be returned, for the trial of a cause in an inferior court: But if twenty four are returned, it is not error, 250

Justice of the Peace.

1. A want of authority, to commit to prison, is not to be intended in a justice of the peace, 130.—But the authority of a justice of the peace, to convict, must be shewn, 129, 130
2. The court will not give leave to file an information against a justice of the peace, unless he have acted from a corrupt or partial motive, 26
3. Leave was given to file an information against a justice of the peace, for discharging a prisoner upon bail, clearly insufficient, 243.—For very improperly refusing to license a number of public houses, 217.—for disobedience to a *mandamus*, 267

Landlord and Tenant.

1. A tenant cannot plead *nil habuit in tenementis*, to an action for the use and occupation brought by his landlord, Page 13
2. It is not necessary to alledge expressly, in the declaration in an action for the use and occupation of land, that the land is the land of the plaintiff, 14
3. A tenant may always deduct the money paid by him for land tax, unless there be an express agreement, that the money paid for land-tax shall not be deducted, 79
4. It is not necessary to alledge expressly, in an order upon the 11 G. 2. c. 19. when the rent became due, or that it was due at the time the tenant carried off his goods, 306
5. It is not necessary to alledge expressly, in an order upon the 11 G. 2. c. 19. against the person who assisted the tenant in carrying off his goods, that the tenant did carry off his goods, 307

Libel.

1. The court refused to give leave to file an information, as for a libel, against a printer, who had published an advertisement concerning a married woman, by the order of her husband, 122
2. The court refused to give leave to file an information, as for a libel, for matter contained in an affidavit, exhibited in the court of Chancery, 112

INDEX TO THE

Malicious Prosecution.

1. An action for a malicious prosecution is not to be encouraged, Page 163
2. In an action for the malicious prosecution of a civil action, the plaintiff must alledge in his declaration, that the former action was determined in his favour, before the present action was brought. 162
3. If an action be brought, for the malicious prosecution of an indictment, the plaintiff must alledge in his declaration, that he was acquitted before the action was brought. 162
4. If a bill of indictment have been found a true bill, it is incumbent upon the plaintiff, in an action for maliciously prosecuting the indictment, to prove express malice, 2

Mandamus.

1. No precise form is necessary to be observed in a *mandamus*. 37
2. The return to a *mandamus* must be in very precise terms, 39, 175
3. A *mandamus* was awarded to justice of the peace, for appointing overseers of the poor. 230
4. A *mandamus* was awarded, in the first instance, to justices of the peace, for allowing a poor's rate, 160
5. The court will not award a *mandamus* to justices of the peace, for licensing a public house, 217
6. A peremptory *mandamus* may be awarded, in the first in-

stance, for electing an officer,

Page 208

7. A *mandamus*, for electing an officer, may be awarded upon the 11 G. 1. c. 4. although there has been an election *de facto*, 212
 8. A second *mandamus* for electing an officer was refused. 105.
—But in another case, it appearing, that there had been delay in proceeding on the first *mandamus*, a second was awarded, 106
 9. It is not necessary to set out particularly, in a *mandamus* for electing an officer of a corporation, the right of the corporation to have such officer, 57
 10. It is a good return to a *mandamus*, for electing an officer, that a person has been duly elected, 140
 11. It is not a good return to a *mandamus*, for restoring a person to an office, that he was not eligible, 40
 12. It is not a good return to a *mandamus*, for restoring a person to an office, that he was removed for neglecting the duty of his office, it being necessary to shew, in such case, the particular instances of neglect. 39
- See court of Quarter Sessions, 3.
—Judgment, 6.—Parish clerk, 2
—Justice of the peace, 3.
Master and Servant.
1. If an injury arise from the neglect of a servant, an action does only lie against his master, 42

P R I N C I P A L M A T T E R S .

2. If an injury arise from the misfeasance of a servant, an action lies against the servant,

Page 42

3. If a servant by the command of his master, do a tortious act, an action lies against both,

41, 42

Name.

The true name of a person, or place, is that which precedes, and not that which follows, *an otherwise called*,

279

See Indictment, 3.

Navy Bill.

The property in a navy bill does not pass without assignment, 73

New Trial.

1. A new trial was granted, because the judge was dissatisfied with the verdict, 1, 2, 264
2. A new trial was granted, because the verdict was contrary to the direction of the judge, in a matter of law, 2, 35
3. A new trial was refused, after an acquittal in an information in the nature of a *quo warranto*, 102
4. A new trial was granted after an acquittal in an indictment, because the defendant had not given due notice of trial, 90
5. A new trial ought not to be granted, upon the account of an after thought of the jurors, 35
6. A new trial ought not to be granted, upon the account of a mistake, made by a witness in giving his evidence, 28

Notice.

1. All notices must be given to the attorney in a cause, if there be one, or to his agent, Page 133
2. By the practice of the crown-Office, a notice may be delivered after nine of the clock in an evening, 165

Order of Removal.

1. A married woman, in case her husband have left her, and his settlement be not known, may be removed by an order to her settlement before marriage, 199
2. If the father of a legitimate child have not a settlement in England, the child may be removed by an order to the settlement of the mother, 200
3. If upon an appeal to an order of removal, it be quashed upon the merits, the quashing is conclusive upon the parish removing, as to the parish to which the removal was; if it be confirmed upon the merits, the confirming is conclusive upon the parish to which the removal was, as to all parishes, 287

Order of Sessions and of Justices of the Peace.

1. A motion to quash an order of sessions, or an order of justices of peace, cannot be made upon the last day of the term, 96
2. An order of sessions may be quashed in part, 311
3. Every

INDEX TO THE

3. Every adjudication upon a statute, made by justices of the peace, is to be deemed an order, if the word convict, or words tantamount thereto, are contained in the statute, Page 164
4. It is not necessary to set out the evidence, in an order of justices of the peace, Page 305
5. If a time for prosecuting be limited, by the statute creating an offence, the precise day, both of offence and of the order, must be shewn in an order of justices of the peace; but if no time be limited, it is not necessary to shew either day, 306
6. An indictment lies, for not paying the costs of an appeal to a poor's rate, pursuant to an order of sessions, 144
7. In an indictment for disobedience to an order of sessions, the order of sessions ought to be set out in the words thereof, 143
See Bastard, 3, 4, 5 — Landlord and tenant, 4, 5. — Parish officer, 2.

Parish Clerk.

1. The offence of parish clerk is, *prima facie*, an office for life, 159, 175
2. A *mandamus* lies for restoring a person to the office of parish clerk, 159, 175

Parish Officer.

1. A collector of toll at a turnpike is a parish officer, 277
2. An indictment lies, against a parish officer, for refusing to receive a *pauper*, removed by

an order of justices of the peace, Page 164

3. An indictment does not lie, against, an overseer of the poor of a parish, for not making a rate of the poor, pursuant to an order of sessions, 152
4. Leave was given to file an information, against a parish officer, for forcibly removing a person who was dangerously ill of the small pox, 78 — For binding a poor child, to serve as an apprentice in foreign parts, 103. — For giving a man money to marry a poor woman, who was a cripple; whereby the charge of maintaining her was thrown upon another parish, 260

Peer.

1. A suit may be commenced against a peer by bill, 64
See Attachment, 2.

Plaintiff.

1. The plaintiff in a cause may prosecute his suit, in person, 217

Pleading.

In the general.

1. Leave was given to imparl, in an action of debt upon a judgment, until a writ of error, brought upon the judgment, should be determined, 44
2. If a thing alledged in pleading may be traversed, it is matter of substance, 275
3. If a thing be alledged in pleading, which it was not necessary to alledge, it may be rejected as surplusage, 142
4. If

P R I N C I P A L M A T T E R S .

4. If what is contained under a *Scilicet*, be contrary to a positive allegation in the pleadings, it may be rejected as surplusage, Page 221

5. If only matter of record be pleaded, the conclusion must be to the record, 300.—But if matter of record, together with matter of fact, be pleaded, the conclusion must be to the country, 208, 300

6. If the plaintiff, in an action of an inferior court, plead a judgment of that court, he must shew the right of holding the court, and that the cause of action arise within its jurisdiction: But if the defendant, in an action in an inferior court, plead a judgment of the court, it is not necessary for him to shew either of these things, 17, 18

7. In one case, which was an action against bail, the court refused to give leave to withdraw a demurrer and amend, after the demurrer had been argued, and the opinion of the court was known, 117

8. In another case, leave was given to withdraw a demurrer and amend, after the demurrer had been argued, and the matter stood for the opinion of the court, 316

9. In another case, after the demurrer was argued, and the justices had given their opinion, judgment was suspended for a week, in order to give the defendant time to move for leave to withdraw the demurrer and amend, 317

Declaration.

1. A declaration against a defendant at large is good, although a bill was not filed at the time of delivering it: But a declaration against a defendant in prison is not good, unless a bill were filed at the time of delivering it. Page 49

2. A new count cannot be added to a declaration after two terms: but if the time for bringing a new action be expired, an amendment, which amounts to the adding of a new count, may be made after two terms, 173, 235

3. If an action be brought for the following words, *thou art a sheep stealing rogue, and farmer Parker told me so*, it is not necessary to aver in the declaration, that farmer *Parker* did not tell the defendant so, 265, 266

See By-Law, 7.—Church, 4.—Covenant, 1.—Game, 3.—Innuendo, 1.—Land and Tenant, 2.—Malicious Prosecution, 2, 3.—Stocks, 2.

Plea.

1. The pendency of a prior action may be pleaded, in bar of a second action of the same matter; but it cannot be pleaded in abatement, 216

2. Every particular fact, pleaded in a plea of privilege, must be verified by affidavit, 19

3. The affidavit, in verification of a dilatory plea, must be positive, as to every matter of fact, which is therein pleaded, 295, 294

4. A de-

INDEX TO THE

4. A demurrer, unless it be for good cause, is not an issuable plea, within the meaning of an undertaking to plead an issuable plea, *Page 88*
 5. Leave was given to plead two pleas, which appeared to be immaterial 29
 6. Infancy, or a release, may be either pleaded specially, or given in evidence upon the general issue, 270
 7. If *tout temps prist* be pleaded by an administrator, he must aver, that his intestate was at all times, from the time of making the promise to the time of his death, ready to pay ; and that he has at all times, since the death of his testator, been ready to pay, 18
 8. The allowance of a simple contract-debt, in a settled account, cannot be pleaded in bar of an action of *Indeb. Assumpsit*, 270
 9. A plea cannot be waved upon the last continuance-day, without the leave of the court, 87
 10. A marriage, before the last continuance-day, cannot be pleaded in a plea of *Puis darrein continuance*, 368
 11. *Non assumpsit infra sex annos* is a special plea, 97
- See Bond, 7.--Landlord and Tenant 1.--Trespas, 28. Trover, 4.

Replication.

1. Leave was given to reply after two terms, it being considered as an amendment 172
2. If a replication in an information in the nature of a *Quo Warranto*, be delivered during the time of vacation, it is not

necessary to give a rule to rejoin, *Page 165*

Rejoinder.

1. Upon the particular circumstances of the case, time was given to rejoin, 197

Poor.

1. The statutes, under which overseers of the poor may be appointed, are to be construed strictly, 279, 280
 2. Overseers of the poor are not to be appointed for a precinct, 279, 280
 3. Separate overseers are not to be appointed, for a township or vill, in a parish, unless the township or vill cannot have the benefit of the 43 *Eliz. c. 2.* 148
 4. A peremptory *Mandamus* was awarded, in the first instance, to justices of the peace, for allowing a poor's rate, 160
 5. A poor's rate cannot be amended, by inserting the name of any person, or leaving out the name of any person, unless the name of the person, intended to be inserted or left out, were mentioned in the notice of appeal to the rate, 118, 119
- See *Mandamus*, 3.—Order of Sessions, 6.—Parish Officer, 2, 3, 4.

Postea.

1. If the defendant in an indictment be found not guilty, the clerk in court must perfect the *Postea*, by entering an acquittal, and bring it into court, although his bill of fees be not paid, 14

Power.

PRINCIPAL MATTERS.

Power.

1. A devise to a stranger was holden to be void, as not being warranted by the power given by a marriage settlement,

Page 296

Prebendary.

1. A prebendary is not entitled to any part of the revenue of a church, before it is divided into shares, unless a particular part of the revenue be allotted to his prebend, 85

Prisoner.

1. A prisoner may be removed, by the person at whose suit he has been taken in execution, out of the custody of the sheriff into the custody of the marshal, 154
2. The first payment of two shillings and four pence is to be made to a prisoner, upon the day of giving him notice, and the weekly payment is afterwards to be made upon the first day in every week. 102
3. If there have been no proceeding against a person, who is in prison for want of appearing, within four months, the prisoner, upon entering an appearance, is entitled to a *superfedeas*, 111
4. If, upon a prisoner's being brought up by a *habeas corpus*, it appear, that he is in custody under an illegal judgment, he may be discharged, 44

Procedendo.

1. A writ of *procedendo* was awarded, in a case wherein the de-

fendant had pleaded *privilege*, although the court refused to award a writ of *superfedeas* to the plea of *privilege*, Page 156

Proceedings.

1. The court will not make a rule for staying proceedings in a cause upon an affidavit that the sum of forty shillings is not due to the plaintiff, 219. 241. —But the court will sometimes, upon such Affidavit, make a rule for referring the matter to the master, 241

Prochein Amy.

1. An infant cannot sue by *prochein amy*, in an action for the penalty given to a common informer, 51

Prohibition.

1. If the defendant, in a suit in a spiritual court, do not reside within the jurisdiction of the court, a prohibition lies, 158
2. If a suit be instituted in a spiritual court, against the occupier of a corn-mill, for predial tithes, a prohibition lies, 43
3. A prohibition does not lie to a suit in a spiritual court, for a faculty to erect a gallery in a church or chapel, 178
4. If the spiritual court had not jurisdiction of a matter, concerning which sentence has been given, a prohibition lies after the sentence, 177

Promissory Note.

1. It is not always necessary, in an action upon a promissory note, to give actual proof, that the name of every indor-
- Y y for

INDEX TO THE

- for of the note is of his hand-writing, Page 223
 2. The *venue* may be changed in an action upon a promissory note, 7

Record.

1. The issuing of a writ is matter of record, in the court from which it did issue, 300
2. No credit is to be given to an affidavit, which is contradictory to a record of quarter sessions, 286

Remainder.

1. If a devise may take effect as a remainder, it cannot take effect as an executor's devise, 238
2. If a remainder be limited by a will to a person *in esse*, it does always vest *eo instante* the testator dies, 238

Rule of Court.

1. The practice of the court, notwithstanding it have varied from the letter of a rule of the court, ought to be adhered to, 303
2. If the facts alledged in an affidavit, upon which a rule to shew cause was made, are so positively and expressly denied, in an affidavit upon which cause is shewn, that, if the denial be false, an indictment will lie for perjury, it is the course of the court to discharge the rule, 111

Sailor.

1. Two or more sailors may join, in a suit in the court of

Admiralty, for their wages, Page 127

2. A surgeon of a ship may sue in the court of Admiralty, for his wages, 137
3. A mate of a ship may sue in the court of Admiralty, for his wages, 137
4. A suit may be instituted in the court of Admiralty, for wages, due upon a contract made on land, 137
5. A suit may be instituted in the court of admiralty, for wages, although the ship had not sailed out of the river *Thames*, at the time the wages became due, 127

Settlement.

1. One settlement cannot be determined until another is gained, 199
2. The settlement of a woman before marriage is not suspended, during her being under coverture, 199
3. If the father of a legitimate child have no settlement in *England*, and the mother have, the settlement of the mother is the settlement of the child, 200
4. If a person reside forty days upon an estate, to which he became entitled by act of law, he gains a settlement, 3
5. If a father, without receiving any pecuniary consideration, grant the remainder of a term of years in a house to his daughter, and the husband of the daughter, reside forty days in

P R I N C I P A L M A T T E R S.

- in the house, he gains a settlement, however small the value of the term is, *Page* 269
6. A settlement is gained, by the occupation of a tenement of the annual value of ten pounds, an actual hiring not being necessary, 312
 7. The settlement, gained by the hiring of a tenement of the annual value of ten pounds, is not gained, by reason of the credit given by the landlord to the tenant, 312
 8. Tenant at will, of a tenement of the annual value of ten pounds, gains a settlement, 312
 9. A settlement cannot be gained, by hiring the moiety of a tenement of the annual value of sixteen pounds, 10
 10. A settlement cannot be gained by hiring the feed of land, or wick of a dairy of cows, 21
 11. An apprentice may gain a settlement, although the duty were not paid for the sum of six pence, which was the consideration money mentioned in his indenture, 170
 12. A settlement cannot be gained, by a hiring and service for a year, unless the commencement of the service were subsequent to the hiring, 8
 13. The gaining of a settlement is not prevented, by the absence of a servant, during the year he was hired for, if the master receive him into his service after the absence 115
116
 14. The gaining of a settlement is not prevented, by the marriage of a servant, during the year he was hired for, 101
 15. A settlement is gained, by executing an annual office a year, although it be executed in only part of a parish, *Page* 134
 16. The son of a certificate-man cannot gain a settlement, in the parish to which the certificate is addressed, by a hiring and service in that parish, while his father resided under the certificate, 12, 171
 17. It is in the general true, that the son of a certificate-man cannot gain a settlement, by serving as an apprentice, in the parish to which the certificate is addressed: But if a certificate-man, or his family have been removed by an order of two justices, or if the certificate have not been resided under for many years, the son of the certificate-man may gain a settlement, by serving as an apprentice, in the parish to which the certificate is addressed, although the certificate be not delivered up, 201, 228, 305
 18. The son of a certificate-man may gain a settlement, by a hiring and service in any parish, except that to which the certificate is addressed, 228
 19. The apprentice to a certificate man may gain a settlement, by serving as an apprentice in any parish, except that to which the certificate is addressed, 232, 288

Sheriff.

1. A Sheriff cannot do a compulsory act out of his county: but he may return a writ, or do any

INDEX TO THE

any act which is not compulsory, out of his county, *Page* 55

Soldier.

1. A private man in one of the troops of horse-guards is such a soldier, as is not liable to an arrest, for a debt under ten pounds, 107

Spiritual Court.

1. Credit is always to be given, by a temporal court, to the judicial acts of a spiritual court, 142, 253
2. The sentence of a spiritual court, in a case wherein spiritual and temporal courts have a concurrent jurisdiction, may be pleaded in a temporal court, 179
3. A temporal court, in order to support the letters or administration granted by a bishop will intend, that the intestate did not leave *Bona Notabilia*, 84

Statute.

1. It is the province of the court to determine, what the meaning of any word or words in a statute is, 64, 192, 193
2. Great regard ought to be had to the established practice of the court in construing a statute, 64
3. Judgment of *non suit* cannot be given upon the 14 G. 2. c. 17. in an action *qui tam*, brought for a penalty given by a statute, if any part of the penalty be given to the king, 22
4. The 13 G. 2. c. 18. whereby the time, for removing an order of justices of the peace by a *certiorari*, is limited to six months, does not extend to the king, 124

5. The 5 W. & M. c. 11 whereby an affidavit is required, before a *certiorari* can be obtained, for removing an indictment for not repairing a highway does not extend to the king, *Page* 124, 128

6. The words in the 13 & 14 W. 3. c. 5. or any other person having privilege of parliament, do extend to a peer, 64

7. A poulterer is not a chapman, within the meaning of the word *Chapman*, in the 5 Ann. c. 14. 192

8. The words, any other engines to kill the game, in the 5 Ann. c. 14. do not extend to a gun, unless the gun have been used for killing the game, 16

9. Charcoal is not firewood, within the meaning of a statute, whereby firewood is exempted from the payment of toll at a turnpike, 5

10. An agreement for the liberty to stack coals upon land, is not a lease of the land, within the meaning of the statute of frauds and perjuries, 4

11. The words any uncertain interest in land, in the statute of frauds and perjuries, do only relate to interests, which are uncertain as to the time of their duration, 4

12. If a thing is required by a statute to be done in the next term, the words, the next term, do always mean the next term, in which it is possible to do the thing, 314

13. The 43 Eliz. c. 2. and the 13 & 14 C. 2. c. 12. by which a power is given of appointing overseers of the poor, ought to be construed strictly, 279, 280

14. The

P R I N C I P A L M A T T E R S.

14. The 10 & 11. *W. c.* 23. by which a reward is given for the apprehending and prosecuting of felons, ought to be construed liberally, Page 277

15. The 13 & 14 *C. 2. c.* 5. which was made for regulating the manufacture of stuffs, within the city of *Norwich* and county of *Norfolk*, is a private statute, 60

See Conviction, 2, 3, 4.—Indictment, 9.

Stocks.

1. If the whole contract for the sale of stocks be registered, it is not necessary, that the register should be signed by the contracting parties, 190

2. If a contract be, that *A.* shall transfer stock, at a certain day to *B.* and that *B.* shall pay a certain sum of money to *A.* for the stock, *A.* may maintain an action for the money, without alledging in his declaration, that he did actually transfer the stock, 189

Superfedeas.

1. Upon the delivery of a writ of error to the clerk of the errors, it becomes a *superfedeas* to a *scire facias* upon the judgment: But if bail be not put in by the plaintiff in error, within four days after the allowance of the writ of error, it ceases to be a *superfedeas*.

2. A writ of error *coram vobis* is not a *superfedeas* in itself: But execution cannot be sued out upon the judgment, while the writ of error is depending,

without the leave of the court, Page 166

Surety of the Peace.

1. The recognisance for keeping the peace, entered into upon the exhibition of articles of the peace, is forfeited, by an assault upon any person, 140

2. This court will not award a *mandamus* to a justice of the peace, for taking a recognisance for keeping the peace, upon articles of the peace, exhibited in this court, unless there are some very particular circumstances in the case, 253

Tenancy in Common.

1. By the words, *equally to be divided*, either in a deed to uses, or in a deed at the common law, a tenancy in common is created, 71, 72

Tithe.

1. No person is liable, as occupier of a corn-mill, to the payment of a predial tithe, 43

Trespass.

1. An action of trespass lies for the making of an excessive distress, in case the distrainer had not any right to distrain, 184

2. It is not necessary, for the defendant, in an action of trespass for a false imprisonment who justifies the imprisonment under a *capias* of an inferior court, to set out all the proceedings in that court, or to shew that the cause of the action in the inferior court arose

INDEX TO THE

- arose within the jurisdiction of that court, *Page* 82, 83
3. The defendant, in an action of trespass, cannot justify the throwing down of a ladder, upon which a person is, although the ladder were unlawfully erected upon the land of the defendant, 139

Trial.

1. The question, whether there has been an usage in a corporation to have certain officers, is proper to be tried by a jury 57
2. Different issues, in the same cause, may be tried in different terms, 130
3. Upon the trial of different issues, at the same time, the evidence, as to every issue, may be given separately, 131
4. A Trial at bar ought not to be granted in any action, except an action of ejectment, before issue is joined, 155
5. A trial at bar ought not to be granted, because the cause is expected to be long, or on the account of the value of the matter in question, 79
6. It is not sufficient, for the obtaining of a trial at bar, to allege generally in an affidavit, that difficulty is expected to arise at the trial of the cause; but the particular difficulty which is expected to arise, ought to be pointed out, 79
7. The trial of a cause was put off, because the defendant's attorney was so ill, as not to be able to attend the trial, 63
8. The court refused to give further time, for the trial of a

feigned issue, after the record had, without any good reason appearing for so doing, been withdrawn, *Page* 215

Trove.

1. A rule was made in one case, upon the particular circumstances of the case, to shew cause, why upon bringing a book into court, for the conversion of which an action of trover was brought, the proceedings in the action should not be stayed, 81.—But in another case, the court refused to make a rule of the like kind, 120
2. It is equally a conversion to sell the goods of *A.* which were delivered to the seller by a person not having a lawful authority to deliver them, as as it is to take the goods of *A.* and sell them, 41
3. It is as much a conversion in *A.* to sell the goods of *B.* for the benefit of *C.* as it would have been, in case *A.* had sold the goods for the benefit of himself, 41
4. A release is the only thing, which can be pleaded specially in an action of trover. 19

Venue.

1. The form of an affidavit for changing the *venue*, 77
2. The *venue* may be changed, after an order has been obtained from a judge, for time to plead, 207
3. The *venue* may be changed, by an amendment, after the defendant has pleaded, 150, 294
4. The

P R I N C I P A L M A T T E R S.

4. The *venue* may be changed, in an action upon a promissory note, or in an action upon a policy of insurance, unless the policy be a deed, *Page* 7
5. The *venue* cannot be changed in an information, 147
6. The *venue* cannot be changed upon the common affidavit in a cause wherein an attorney of this court is plaintiff, 153, 180
7. The *venue* cannot be changed, from an *English* to a *Weich* county, 48
8. The delivery of a writ is material evidence, within the meaning of an undertaking to give material evidence, entered into upon the discharging of a rule to shew cause, why the *venue* should not be changed, 56

Verdict.

1. A verdict, for the finding of which the jurors voted, is good, 100
2. A verdict, for the finding of which there was sufficient evidence, is good, although improper evidence was admitted, 190
3. A verdict, found in an inferior court, is good, although twenty-four persons were returned upon the pannel for the jury, 256
4. Every intendment, which can fairly be made, ought to be made, for the sake of supporting a verdict, 164, 168
5. But the court will not intend, that a thing, which is not alledged in the declaration, was proved; because there

was no necessity of proving such thing, *Page* 282

6. The court refused to set aside the proceedings after a verdict, on the account of a mistake, in inserting the word *London* in the copy of the declaration delivered, instead of the word *Middlesex*, 154
7. If a verdict do not find the whole that is in issue, no judgment can be given upon it, 36

Warrant.

1. It is not necessary, that the authority to commit should appear in a warrant of commitment, 129

Warrant of Attorney.

1. If a warrant of attorney, to confess a judgment, be entered into by two persons, and one of them die, judgment may be entered up against the other, 6

Will.

1. The meaning of former words, contained in a will, may be restrained by subsequent words, 238
2. If the manifest intention of a testator cannot be answered, unless the devisee of an estate take an estate in fee, a fee will pass by the will, although the words thereof are not sufficient to pass such estate, 195
3. If there have been a surrender of a copyhold estate, to the use of the surrenderor's will, the estate will pass by any words, in the will of the surrenderor, which amount to an appointment under the surrender, 195

Witness.

INDEX TO THE, &c.

Witness.

1. A father, who is a freeman of a corporation, is an admissible Witness, to prove a custom in the corporation, under which his son claims a right of admission to the freedom of the corporation, *Page 46*
2. An inhabitant of a parish, who is not rated to the poor, is a competent witness, in an action for the penalty the moiety of which is given to the poor of the parish, 180
3. The person, to whom money has been given to forbear to vote at an election, is a competent witness, in an action for the penalty given by 2 G. 2. c. 24. 290
4. A married woman is an admissible witness to prove, that a child, born of her body, was begotten by a man not her husband: but she cannot be admitted to prove, that her husband had no access to her, 62

Words.

1. The words, for the speaking of which an action has been brought, are to be construed by the court in that sense,

wherein they are generally understood, *Page 265*

2. An action lies for speaking the following words of a woman, *she keeps a bawdy house,* 33
3. An action lies for speaking the following words, *thou art a sheepstealing rogue, and farmer Parker told me so,* and it is not necessary to aver, in the declaration, that farmer Parker did not tell the defendant so, 265, 266

See Innuendo, 1.

Writ of Enquiry.

1. It is not error, to make a writ of enquiry, in an action commenced in the court of Common Pleas by bill, returnable upon a general return day, 245
2. The sign of the house, at which a writ of enquiry is to be executed, and that it is to be executed between two certain hours, must be mentioned, in the notice for executing a writ of enquiry, 181
3. If the treble damages given by the 43 *Eliz. c. 2.* have not been assessed by the jury, a writ of enquiry may be obtained for the assessing of such damages, 214

F I N I S.



